BLANK

PAGE

CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 262

THE UNITED STATES OF AMERICA, PETITIONER

vs.

GARBUTT OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 28, 1937.
CERTIORARI GRANTED OCTOBER 11, 1937

BLANK

PAGE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 262

THE UNITED STATES OF AMERICA, PETITIONER

vs.

GARBUTT OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

	Page
Record from D. C. U. S., Southern California	1
Names and addresses of attorneys	1
Citation and service	2
Docket entries	4
Complaint	7
Exhibit A.—Treasury Department Letter and Schedules Showing Basis for Assessment	19
Exhibit B.—Claim for Refund of Taxes Illegally Collected	22
Exhibit C.—Statement of Garbutt Oil Company	33
Exhibit D.—Treasury Department Letter of August 12, 1929, Robinson to Garbutt Oil Company	37
Exhibit E.—Treasury Department Letter of November 13, 1929, Robinson to Garbutt Oil Company	39
Exhibit F.—Treasury Department Letter of November 21, 1929, Suman to Garbutt Oil Company	42
Answer	43
Waiver of jury trial	46
Stipulation of facts	47
Exhibit 1.—Lease dated October 3, 1907, Margarita Guirado Dallugge *et al.* and Garbutt Oil Company	50a
Exhibit 2.—Minutes of the Board of Directors of Garbutt Oil Company of April 10, 1911	50o
Memorandum of conclusions, Hollzer, J.	51

	Page
Special findings of fact and conclusions of law	53
Judgment	69
Petition for appeal	71
Assignments of error	72
Order allowing appeal, etc	78
Stipulation for costs on appeal	79
Amended praecipe for record	81
Clerk's certificate	83
Proceedings in U. S. C. C. A., Ninth Circuit	85
Order of submission	85
Order directing filing of opinion and judgment	85
Opinion, Neterer, J	85
Judgment	89
Clerk's certificate	90
Order allowing certiorari	91

Names and Addresses of Attorneys.

For Appellant:

CLAUDE I. PARKER, Esq.,
BAYLEY KOHLMEIER, Esq.,

Bank of America Building,
Los Angeles, California.

For Appellee:

PEIRSON M. HALL, Esq.,
United States Attorney,

CLYDE THOMAS, Esq.,
Assistant United States Attorney,

Federal Building,
Los Angeles, California.

United States of America, ss.

To UNITED STATES OF AMERICA, and to PEIRSON M. HALL, its Attorney, and to HOMER S. CUMMINGS, UNITED STATES ATTORNEY GENERAL Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 2nd day of July, A. D. 1936, pursuant to Order Allowing Appeal filed June 2, 1936 in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain case entitled GARBUTT OIL COMPANY, a corporation, vs. UNITED STATES OF AMERICA, Docket Number 5094-H, wherein the Garbutt Oil Company is plaintiff and appellant and the United States of America is defendant and appellee to show cause, if any there be, why the judgment rendered against the plaintiff and appellant as in the said petition for appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable HARRY A. HOLLZER United States District Judge for the Southern District of California, this 2 day of June, A. D. 1936, and of the Independence of the United States, the one hundred and sixtieth

Hollzer

U. S. District Judge for the Southern District of California.

Service of the above Citation and receipt of a copy thereof, together with a copy of the Petition for Appeal, Assignment of Errors and Order Allowing Appeal herein is hereby admitted this 3rd day of June, 1936.

Peirson M. Hall
By E. H. Mitchell
Counsel for Defendant and Appellee.

[Endorsed]: Filed Jun. 3, 1936. R. S. Zimmerman Clerk By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

ADMISSION OF SERVICE

Service of the Citation issued in the above entitled case on June 2, 1936 by Hon. Harry A. Hollzer, United States District Judge for the Southern District of California, and receipt of a copy of said Citation, together with a copy of the Petition for Appeal, Assignment of Errors and Order Allowing Appeal herein, is hereby admitted this 8th day of June, 1936.

.....

United States Attorney General
By Robert H. Jackson
Assistant Attorney General.

[Endorsed]: Filed Jun. 19, 1936 R. S. Zimmerman, Clerk By L. Wayne Thomas, Deputy Clerk

DOCKET

DOCKET 5094-H

TITLE OF CASE: Garbutt Oil Company, a corporation

vs.

United States of America

Complaint to recover taxes illegally assessed and collected.

ATTORNEYS:

For Plaintiff: Claude I. Parker, John B. Milliken & Geo. H. Koster.

For Defendant:

DATE			FILINGS—PROCEEDINGS
Month	Day	Year	
Nov.	20	1931	Fld Complaint to recover taxes.
"	25	"	Fld affid of serv of compl upon U S Atty Genl; Fld affid of serv of compl upon U S Atty.
Jan.	29	1932	Fld stip and ord thereon extdg time to 2/21/32 deft to plead.
Feb.	24	"	Fld stip extg time to 3/21/32 deft to plead with ord thereon.
Mar.	21	"	Fld stip & ord thereon extg time 3/31/32 deft to plead.
"	23	"	Fld Answer of deft.

Sept.	7	"	Ent Cause on T T Cal Sept. term 1932.
"	12	"	Ent ord contg for term.
Feb.	1	1933	Ent Cause T T Cal Feb term 1933.
"	6	"	Ent ord contg term for settg N/A.
Sept.	6	"	Ent Cause T T Cal Sept term 1933.
"	11	"	Ent ord contg for term.
Jan.	31	1934	Ent Cause T T Cal Feb term 1934.
Feb.	5	"	Ent ord settg for trial 6/19/34. Ent oral waiver of jury trial.
May	8	"	Fld stip & ord that this cause now set for trial 6/19/34, may be contg for term.
Sept.	5	"	Ent Cause on T T Cal Sept term 1934.
"	11	"	Ent ord setting for trial 4/2/35.
Mar.	13	1935	Made report JS5.
"	29	"	Fld stip & ord waiving jury trial.
Apr.	2	"	Ent ord cont to 4/4/35 trial.
Apr.	4	1935	Ent proc trial Cases 5094 & 6287. Fld stip of facts. Fld 6 Plf Exhs. Ent ord memo be filed in 5 days & cases then stand submitted.
"	8	"	Fld separate pre-trial memo of each side.
June	6	"	Fld supplement to Plf brief.
Aug.	2	"	Fld Plfs brief. Fld Deft brief.

Dec. 31	"	Fld memo of concl & ent min ord thereon favor deft & direct findings & judg be prepared.
Mar. 2	1936	Ent ord allow & disallow cert proposed amends to defts prop findings.
" 5	"	Fld ord extend time for deft to file B/E to 5/15 & extend term.
" 10	"	Fld spec findings of fact & conclusions of law. Fld Dock & Ent Judg. Defts have costs. JBk 8/192. Made report JS6.
" 11	"	Fld defts cost bill & affid serv. Fld ord extending time for deft to file bill of exceptions to 6/8/36 & extending term.
" 14	"	Taxed costs in favor of deft $16.00. Dock & ent costs.
" 20	"	Fld J R—Closed.
June 2	"	Fld plfs pet for appeal. Fld ord allowg appeal. Fld assign of errors. Citation signed by Judge Hollzer ret. 7/2/36.
" 3	"	Fld prae of plf for rec on appeal. Fld not thereof. Fld citation served.
" 4	"	Fld cost bond on appeal.
" 19	"	Fld admis of serv of appeal papers.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

GARBUTT OIL COMPANY, a corporation, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	No. 5094-H COMPLAINT IN LAW For Recovery of Taxes Illegally Assessed and Collected.

Comes now the plaintiff above named, and for its cause of action against the defendant above named, alleges and says:

I

That plaintiff is now and was at all times herein mentioned, a corporation duly chartered, organized and existing under and by virtue of the laws of the State of California, having its office and principal place of business in the City of Los Angeles, in the Southern District of California, and was engaged in the business of producing oil and gas. That plaintiff has at all times borne true allegiance to the Government of the United States of America, and has not in any way aided, abetted or given encouragement to rebellion against the government, or at any time aided or abetted in any manner or given comfort to any sovereign or government that is or ever was at war with the United States.

II

That at all times herein mentioned the above named defendant was and is a sovereign body politic, by whom the taxes for which refund is here claimed were wrongfully through its agents collected.

III

That plaintiff seeks to recover from the United States of America the sum of $3,105.65, being the amount of overpayment by this plaintiff of its income and excess profits taxes for the calendar year ended December 31, 1919, which said sum was in excess of the tax legally due from said plaintiff and was illegally collected from said plaintiff by Rex B. Goodcell, then Collector of Internal Revenue for the Sixth District of California at Los Angeles, California; that said Rex B. Goodcell, by whom said overpayment of taxes was collected, as aforesaid, is no longer in office as Collector of Internal Revenue for said Sixth District of California at Los Angeles, California, having been succeeded in that office by Galen H. Welch, who is now the duly appointed and acting Collector of Internal Revenue for said Internal Revenue District.

IV

That under the provisions of the Act of Congress known as the Revenue Act of 1918, plaintiff prepared and on or about March 15, 1920, duly filed with the then acting Collector of Internal Revenue at Los Angeles, California an income and excess profits tax return of its net income and invested capital for its calendar year ended December 31, 1919; that said return disclosed a net income for said calendar year in the amount of $16,928.61 and an invested capital for said calendar year

in the amount of $133,842.38 and a total income and excess profits taxes for said calendar year in the amount of $2,072.68; that said taxes in the amount of $2,072.68 was duly paid to the then Collector of Internal Revenue at Los Angeles, California in installments during the year 1920 as permitted by law.

V

That after the filing of said income and profits tax return for the calendar year 1919 by said plaintiff corporation the Commissioner of Internal Revenue made an audit of said return and did adjust the net income as disclosed by said return by reducing the deduction taken on said return for depletion of plaintiff corporation's oil property; that the Commissioner's adjustment reduced the depletion deducted on the return in the amount of $14,788.17 to $11,024.75, a net reduction of $3,763.42, and correspondingly increased the net income as disclosed by said return in the amount of $16,928.61 by said adjustment of the depletion deduction of $3,763.42 and said Commissioner determined the correct taxable income of said plaintiff corporation for said calendar year 1919 to be $20,692.03; that the Commissioner of Internal Revenue then computed plaintiff corporation's excess profits tax for said calendar year 1919 under the provisions of Section 302 of the Revenue Act of 1918 and determined a total revised income and profits tax for which said plaintiff corporation was liable as its income and profits tax for said calendar year 1919 in the amount of $5,178.33; that against this revised tax of $5,178.33 the Commissioner of Internal Revenue allowed as a credit the amount of $2,072.68 paid by the plaintiff corporation as the tax shown on its return for said year, as aforesaid, and determined a deficiency

in tax against said plaintiff corporation for said calendar year 1919 in the amount of $3,105.65; the basis, as herein alleged, for the determination by said Commissioner of Internal Revenue of this deficiency in tax is disclosed in a letter from the office of the Commissioner of Internal Revenue addressed to the plaintiff corporation dated August 18, 1927, copy of which is hereto attached, marked EXHIBIT A and hereby made a part hereof; that said deficiency in income and excess profits taxes against plaintiff corporation for its calendar year ended December 31, 1919 in the amount of $3,105.65 was duly assessed against said plaintiff corporation and payment thereof was duly demanded of the plaintiff corporation by the then acting Collector of Internal Revenue under threat that unless said tax was paid within ten days from the date of said demand the collection of said tax would be enforced by distraint or other proceeding, and said deficiency in tax was thereupon duly paid by plaintiff corporation on, to wit, June 3, 1925, to Rex B. Goodcell, the then Collector of Internal Revenue at Los Angeles, California.

VI

That the plaintiff corporation was organized in 1907 with an authorized capital stock of $500,000.00 for the purpose of obtaining a lease for the development and production of oil and gas from certain oil properties; that said corporation did during the year 1907 acquire from Margarita Guirado Dallugge, Martin C. Marsh, Adolph Ramish, and Albert M. Stephens a certain twenty year lease dated October 3, 1907, of proven oil property described as a part of the Rancho La Brea, in the County of Los Angeles, State of California, and being a part of

that tract of land conveyed by Samuel R. Hancock to Bernardino Guirado and Albert M. Stephens, on the 28th day of December, 1899, by deed recorded in Book 1349, page 61 of Deeds, for the purpose of development and production of oil and gas therefrom; that in consideration for said lease, plaintiff corporation did issue to said Margarita Guirado Dallugge, Martin C. Marsh, Adolph Ramish, and Albert M. Stephens $250,000.00 par value of its capital stock; that at the time of the execution of said lease to the plaintiff corporation the plaintiff corporation contracted with the Union Oil Company, a corporation organized and existing under the laws of the State of California, whereby said Union Oil Company agreed to advance to plaintiff corporation all material, machinery and money necessary to bore and operate three wells upon said oil property and if such wells or any of them should produce oil in paying quantities said Union Oil Company agreed further to advance materials, machinery and money for any additional wells as might then be agreed upon, and said Union Oil Company further agreed to purchase from the plaintiff corporation at the wells all oil and gas produced from said wells, and in consideration for this agreement plaintiff corporation agreed that said Union Oil Company might be reimbursed for its expenditures out of plaintiff corporation's share of the first oil produced from said property and also agreed to issue $250,000.00 par value of its capital stock to said Union Oil Company, its nominee or assigns, and did in fact issue under date of February 25, 1908 said $250,000.00 par value of its capital stock to the nominee of said Union Oil Company in consideration of the contract aforesaid; that pursuant to said contract the said Union Oil Company did advance material, machinery and money for the

drilling of plaintiff corporation's oil wells, and did drill and complete the first of said wells during the year 1908 as commercially producing oil wells; that the fair market value of said lease of said oil property on the date of its acquisition was at least, to wit, $250,000.00; that the fair market value of said contract with said Union Oil Company at the time it was entered into and capital stock of the plaintiff corporation issued therefor was at least, to wit, $250,000.00.

VII

That in computing its net income subject to tax as disclosed on its income and profits tax return for said calendar year 1919, plaintiff corporation erroneously failed to claim as a deduction amortization of the cost of said Union Oil contract and the Commissioner of Internal Revenue in his adjustment of plaintiff corporation's net income for said year likewise erroneously failed and refused to allow a deduction in gross income for amortization of said cost of said Union Oil contract; that the amount of deduction to which plaintiff corporation is justly entitled as a deduction from its gross income for said calendar year 1919 as amortization of cost of said Union Oil contract is $12,500.00, being one-twentieth (1/20th) of the total cost of $250,000.00, which total cost plaintiff corporation is justly entitled to have returned to it by way of deduction as amortization proportionately each year over the twenty year life of said contract; that as a result of the failure and refusal of the said Commissioner of Internal Revenue to allow said amortization as a deduction from plaintiff's gross income for said calendar year 1919 in determining its net income for said taxable year, plaintiff corporation was compelled to overpay

its income and excess profits taxes for said year in at least the amount for which this suit is brought.

VIII

That in computing its invested capital as disclosed on its income and profits tax return for said calendar year 1919, plaintiff corporation erroneously failed to include as a part of its invested capital, the unamortized cost as of January 1, 1919 of the Union Oil contract, and the Commissioner of Internal Revenue in his adjustment of plaintiff corporation's return for said year 1919 likewise failed and refused to allow said unamortized cost of the Union Oil contract as part of plaintiff corporation's invested capital; that plaintiff corporation's invested capital for excess profits tax purposes for said year 1919 is, to wit, $167,010.26; that the Commission of Internal Revenue erred in refusing to allow said unamortized cost of the Union Oil contract as part of plaintiff corporation's invested capital, and the tax resulting therefrom was erroneously and illegally assessed against and collected from said plaintiff corporation.

IX

That on April 10, 1911 plaintiff corporation, by its Board of Directors, adopted the following resolution:

"BE IT RESOLVED that oil produced by this company since the 1st of January, 1911 shall be assigned to the lessors to the extent of their royalty and to the stockholders to the extent of their holdings of stock in the proportions to which they are severally entitled to receive it —in kind; so long as the stockholders severally pay calls of the superintendent and secretary for money necessary

to cover all expenses of the company, said calls for money to be paid by the 14th day of each month for the expenses of the current month; and if any stockholder shall fail to pay his proportion for said current expenses, then the right of such stockholder to receive such oil in kind shall cease and shall pass back to the company."

That said resolution was in full force and effect during the entire calendar year 1919; that pursuant to said resolution all the oil produced from plaintiff corporation's property during the calendar year 1919 was received in kind by the lessors and by the stockholders of said plaintiff corporation according to their proportionate interests, and during the entire calendar year 1919 all expenses of the company were paid from moneys received under calls or assessments from the stockholders; that during the entire calendar year 1919 plaintiff corporation made no sales of oil or gas produced from its property and received no income therefrom, nor did plaintiff corporation receive income from any other source; that on its income tax return for said calendar year 1919 plaintiff corporation erroneously treated the market value of the oil produced from its properties as its gross income and deducted therefrom the cost of production and other expenses in determining the net income subject to tax; that the Commissioner of Internal Revenue in making his determination of the gross income of the plaintiff corporation for said calendar year 1919 likewise included the market value of the oil produced from plaintiff corporation's property as its gross income; that in this respect the tax return of plaintiff corporation and the Commissioner's determination are in error; that in fact plaintiff corporation had no income of any nature during said calendar year 1919 and was not subject to tax in that year; that

by reason of said Commissioner's erroneous determination that the plaintiff corporation realized income during said calendar year 1919 and by reason of the erroneous assessment and collection of tax from plaintiff corporation for said year, plaintiff corporation overpaid its taxes for said year in at least the amount for which this suit is brought.

X

That after the payment by the plaintiff corporation of the deficiency in tax for the year 1919 in the amount of $3,105.65, as aforesaid, plaintiff corporation duly filed with the Collector of Internal Revenue for the Sixth District of California its claim for refund of $3,105.65 (or such greater amount as is legally refundable) for overpayment of taxes for its calendar year 1919 and alleged therein as ground for said claim that the Commissioner of Internal Revenue erred in failing to allow as a deduction from its gross income for said calendar year 1919 an amount of $12,500.00 as amortization of its cost of its contract with the Union Oil Company as hereinbefore alleged, and further, that the Commissioner of Internal Revenue erred in failing to include as part of the plaintiff corporation's invested capital for said calendar year 1919 the unamortized portion of said cost of said Union Oil contract; copy of said claim for refund is hereto attached, marked EXHIBIT B and hereby made a part hereof; that thereafter, under date of May 29, 1929 plaintiff corporation filed with the Commissioner of Internal Revenue a statement for the purpose of perfecting and completing said claim for refund hereinbefore referred to, said state-

ment bearing date of May 20, 1929, copy of which is hereto attached, marked EXHIBIT C and hereby made a part hereof, and in said statement plaintiff corporation notified said Commissioner of Internal Revenue that as further ground for its claim for the refund of taxes overpaid by it for said calendar year 1919 it alleges that the Commissioner of Internal Revenue erred in determining that plaintiff corporation realized any income for said calendar year 1919 for the reason that all the oil and gas produced by it was distributed in kind to its lessor and stockholders according to their proportionate interests and it had income from no other source, and that thereafter said Commissioner of Internal Revenue considered said claim for refund and said supplemental statement and did, under date of August 12, 1929, notify said plaintiff corporation that its contentions raised in said claim for refund and said supplemental statements could not be considered and that its claim for refund would therefore be rejected; copy of said letter of August 12, 1929, is hereto attached, marked EXHIBIT D and hereby made a part hereof; that thereafter the Commissioner of Internal Revenue did, under date of November 13, 1929, again notify plaintiff corporation that its claim for refund would be rejected; copy of said letter of November 13, 1929, is hereto attached, marked EXHIBIT E and hereby made a part hereof; that thereafter, under date of November 21, 1929, the Commissioner of Internal Revenue notified plaintiff corporation that its claim for refund for 1919 taxes in the amount of $3,105.65 had been rejected on a schedule

dated November 21, 1929; copy of said letter of November 21, 1929 is hereto attached, marked EXHIBIT F and hereby made a part hereof.

XI

Plaintiff corporation further alleges that no other action has been had on said claim here sued upon by Congress or by any department of the government or in any court, and that it is the sole and absolute owner of the claim herewith presented; that it has made no transfer or assignment of said claim or of any part thereof, and that plaintiff is justly entitled to the amount claimed herein from the United States after allowing all just credits and offsets.

WHEREFORE, plaintiff prays for judgment in its favor and against the United States of America for said sum of Three Thousand One Hundred Five Dollars and Sixty-five Cents ($3,105.65), together with interest from the 3rd day of June, 1925 at the rate of six per cent (6%) per annum as provided by law, and for its costs herein expended, and for such other and further relief as may to this Honorable Court seem just and proper in the premises.

Claude I. Parker
John B. Milliken
George H. Koster
Attorneys for Plaintiff

808 Bank of America Building
Los Angeles, California.

STATE OF CALIFORNIA)
(ss.
COUNTY OF LOS ANGELES)

John McPeak, being first duly sworn, deposes and says: that he is the Secretary of the GARBUTT OIL COMPANY, a corporation, the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

John McPeak

Subscribed and sworn to before me
this 20 day of November, 1931.

[Seal] Frances A. Gragg
Notary Public in and for the County
of Los Angeles, State of California.

EXHIBIT A

TREASURY DEPARTMENT
Washington

Office of
Commissioner of Internal Revenue

Address reply to
Commissioner of Internal Revenue

Aug 18, 1927

and refer to
IT:CR:G-7
JWL

Garbutt Oil Company,
548 So. Spring Street,
Los Angeles, California.

Sirs:

In compliance with the request of your representative, Mr. Claude I. Parker, Washington, D. C., dated July 18, 1927, there is enclosed copy of schedules showing the basis of the additional assessment of $3,105.65 for the year 1919.

Respectfully,

C. R. NASH,
Assistant to the Commissioner.
By C. O. HEAP
Assistant Head of Division.

Enclosures:
Schedules.

—1—

Garbutt Oil Company. Year ended December 31, 1919.

Schedule 1

Net Income

Net income as disclosed by return	$16,928.61
As corrected	20,692.03
Additional income:	
(a) Excessive depletion	$ 3,763.42

Schedule 1(a)

Explanation of Item Changed

(a) Excessive depletion—

March 1, 1913 value of lease	$126,932.00
Estimated recoverable reserves	507,728 bbls.
Rate per bbl.	$ .25
Production for year	44,099
Depletion sustained	$ 11,024.75
Depletion taken	14,788.17
Excessive depletion	$ 3,763.42

In view of the fact that the profits tax as computed under Section 302 of the Revenue Act of 1918 is in excess of the tax as computed under Section 301 of the same Act, you have been given the benefit of the computation of tax under Section 302.

Schedule 2

Computation of Tax, 1919 Rates
Excess Profits Tax

Section 302			Tax
Net income for year		$20,692.03	
Less:			
Amount taxable @ 20%	$17,000.00		$3,400.00
Amount taxable @ 40%	692.03	20,692.03	276.81
Excess profits tax			$3,676.81

Income Tax

Net income taxable year		$20,692.03	
Less:			
Exemption	$2,000.00		
Excess profits tax	3,676.81	5,676.81	
Balance taxable @ 10%		$15,015.22	
Income tax			$1,501.52
Total income and profits tax			$5,178.33
Previously assessed			2,072.68
Additional to be assessed			$3,105.65

EXHIBIT B

(EXECUTE SEPARATE FORM FOR EACH TAX PERIOD)

Form 843—Jan., 1922 TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE Comptroller General U. S. January 18, 1922

CLAIM FOR

[ ]ABATEMENT OF TAX ASSESSED

[ ]CREDIT AGAINST OUTSTANDING ASSESSMENTS

[xxx]REFUND OF TAXES ILLEGALLY COLLECTED

[ ]REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS

NOTICE TO COLLECTOR—Collector must indicate in block above the kind of claim, except in Income Tax cases.

IMPORTANT—File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

COLLECTOR'S NOTATION

District Account number Date received

[ ]

Stamp here

.....

Collector of Internal Revenue

Date received by Administrative Unit

[ ]

Stamp here

State of CALIFORNIA)
) ss:
County of LOS ANGELES)

[Type or Print] GARBUTT OIL COMPANY

(Name of taxpayer or purchaser of stamps.)

UNION OIL BUILDING

(Residence—give street and number as well as city or town and State.)

LOS ANGELES, CALIFORNIA

(Business address.)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged — Period — Year
   Production of Oil — From: Jan. 1st 1919
   To: Dec. 31st 1919
2. Character of assessment or tax.....
   .....
   (State for or upon what the tax was assessed or the stamps affixed.)
3. Amount of assessment or stamps purchased .....$ 5,178.33
4. Reduction of Tax Liability requested (Income and Profits Tax).....$ 3,105.65
5. Amount to be abated.....$.....

6. Amount to be refunded (or such greater amount as is legally refundable)....$ 3,105.65

7. Dates of payment (see Collector's receipts or indorsements of canceled checks).....

(If statement covers income tax liability, items 8-11, inclusive, must be answered.)

8. District in which return (if any) was filed Sixth California.....

9. District in which unpaid assessment appears.....

10. Amount of overpayment claimed as credit $.....

11. Unpaid assessment against which credit is asked; period from.....to.....$.....

Deponent verily believes that this application should be allowed for the following reasons:

The amount set out on line three above represents income and profits tax assessed against claimant for the calendar year 1919 and made up as follows:

Assessed on original return	$ 2,072.68
Additional assessed on basis of Commissioner's audit	3,105.65
	$ 5,178.33

The tax assessed on the original return was paid within the year 1920 and the additional tax was paid with check drawn in favor of the Collector of Internal Revenue at Los Angeles, California, dated March 31, 1925. It is now contended that the whole amount of additional tax paid should be refunded for the reasons set out below.

According to information given by the Commissioner in his letter addressed to claimant corporation under date of August 18, 1927 the additional tax liability was determined as follows:

"Net income as disclosed by return	$ 16,928.61
As corrected	20,692.03
Additional income:	
(a) Excessive depletion	$ 3,763.42

Explanation of Item changed

(a) Excessive depletion—	
March 1, 1913 value of lease	$126,932.00
Estimated recoverable reserves	507,728 bbls.
Rate per bbl.	$ .25
Production for year	44,099
Depletion sustained	$ 11,024.75
Depletion taken	14,788.17
Excessive depletion	3,763.42

In view of the fact that the profits tax as computed under Section 302 of the Revenue Act of 1918 is in excess of the tax as computed under Section 301 of the same Act, you have been given the benefit of the computation of tax under Section 302.

Computation of Tax, 1919 Rates

Excess Profits Tax

Section 302			Tax
Net income for year		$20,692.03	
Less:			
Amount taxable @ 20%	$17,000.00		$3,400.00
Amount taxable @ 40%	692.03	20,692.03	276.81
Excess profits tax			$3,676.81

Income Tax

Net income taxable year		$20,692.03	
Less:			
Exemption	$ 2,000.00		
Excess profits tax	3,676.81	5,676.81	
Balance taxable @ 10%		$15,015.22	
Income tax			$1,501.52
Total income and profits tax			$5,178.33
Previously assessed			2,072.68
Additional to be assessed			$3,105.65"

Exception is taken to the Commissioner's determination of taxable net income and to his computation of the excess profits tax under Section 302 of the Revenue Act of 1918 rather than under the provisions of Section 301 based on allowable invested capital.

As to the determination of net income it is contended that said net income was overstated to the extent of $12,500.00, by reason of the following:

This corporation was organized during the latter part of the year 1907 with an authorized capital stock of $500,000.00. Under contract dated November 3, 1907, it was provided that on the organization of the corporation one-half of its authorized capital stock should be issued fully paid up to the then owners of an oil lease and one-half of said authorized capital stock should be issued to the Union Oil Company of California. The consideration in the first instance being the transfer of the lease to the corporation and in the second instance an agreement on the part of the Union Oil Company of California to provide the expenses of developing the property for which it was to be reimbursed only out of any oil which might be produced.

Although the agreement referred to provided that an equal amount of the Company's capital stock should be set up for the lease and contract, viz.: $250,000.00 of par value, said assets were taken up on the books as follows:

Contract with Union Oil Company	$250,000.00
Lease	187,500.00
Stock Discount	62,500.00
Total—	$500,000.00

However, the Commissioner has apparently conceded that the lease cost claimant corporation $250,000.00. In this connection reference is made to letter addressed to claimant corporation by the Commissioner relative to the determination of its tax liability for the year 1918, said

letter being dated February 3, 1925, IT:CR:G-2-MPS. In said letter the adjustments with respect to invested capital are set forth as follows:

"Invested capital as disclosed by return		$391,551.54
As corrected		28,364.50
Deductions		$363,187.04
Deductions:		
(a) Stock discount disallowed	$ 43,750.00	
(b) Contract with Union Oil Company disallowed	250,000.00	
(c) Value of lease decreased	69,347.79	
(d) 1917 taxes prorated	89.25	
Total deductions		$363,187.04

(a) Stock discount disallowed $43,750.00

Discount on the sale of capital stock is not allowable as invested capital.

(b) Contract with Union Oil Company disallowed $250,000.00

Inasmuch as this contract had no value as at January 1, 1918, it is not allowable for invested capital purposes.

(c) Value of lease decreased $69,347.79

Value as shown on return	$133,093.54
Value as corrected based on cost less Depletion	63,745.75
Decrease	$ 69,347.79

(d) 1917 taxes prorated $89.25

The tax due for 1917 in the amount of $162.87 is prorated from invested capital for 200 days as follows: $162.87 multiplied by 200/365 equals—$89.25."

From the foregoing it is appa_rent that an undepleted cost of $63,745.75 for the lease has been determined as of January 1, 1918. Based on the assumption that the Commissioner has allowed $250,000.00 as the original cost of the lease when acquired by the corporation in 1907, and since an equal amount of capital stock was issued to the Union Oil Company of California for entering into the contract, it is concluded that the same cost should be assigned for the contract as was allowed for the lease. It is submitted that the said contract was valuable to claimant corporation throughout the entire life of the lease and that it was in error in writing same off its books during the year 1918.

Had it not been for the contract whereby the Union Oil Company of California agreed to develop the property and take a chance of securing reimbursement for the cost of such development, if, and when, oil was produced from the property, it might not have been possible for claimant corporation to have provided funds for the development of its property, thereby enabling it to realize an income from said property during the life of the lease. It is therefore contended that whatever cost is assigned to the contract should be ratably spread over the period of the lease. On this basis the cost of said contract

should be amortized over a twenty-year period and one-twentieth (1/20) thereof should be allowable as a deduction for each year of said period. By using a cost for the contract of $250,000.00, the allowance for amortization applicable to the year 1919 would be $12,500.00. It is therefore submitted that the net income determined by the Commissioner for the year 1919 should be reduced to the extent of $12,500.00, thereby making a revised net income of $8,192.03.

The invested capital as shown on the return filed by claimant for the year 1919 was $133,842.38. In the balance sheet as of January 1, 1919, attached to said return, the lease was shown at $118,305.37. No cost is shown on said balance sheet for the contract with the Union Oil Company of California, neither is the stock discount of $43,750.00 shown as an asset. Therefore, in order to bring the invested capital for the year 1919 to the same basis as was determined by the Commissioner for the year 1918, the following adjustments should be made:

As an unreturned cost was determined for the lease by the Commissioner as of January 1, 1918 of $63,745.75, and a depletion was allowed for said year of $10,647.50, the unreturned cost for the lease as of January 1, 1919 would be $53,098.25, as compared to the $118,305.37 shown by the company's balance sheet as of January 1, 1919, so that a reduction in the invested capital as claimed on this account should be $65,207.12.

Since the unamortized cost of the contract with the Union Oil Company is not reflected in the invested capital

as claimed by the corporation, it is submitted that in line with the above contentions the original cost of said contract less accumulated amortization down to January 1, 1919 should be included as a part of the company's invested capital for the year 1919. The addition to invested capital on account of this contract would be determined as follows:

Original cost of contract	$250,000.00
Less amount returnable through amortization October 3, 1907 to December 31, 1918 (11 years and 3 months)	140,625.00
Unreturned cost	$109,375.00

On the basis of the foregoing a revised invested capital would be arrived at as follows:

Amount claimed on the return	$133,842.38
Less excessive cost of lease eliminated	65,207.12
Difference	$ 57,635.26
Plus unreturned cost of contract, as above	109,375.00
Revised invested capital	$167,010.26

Excess Profits Credit:

8% of $167,010.26	$ 13,360.82
Special exemption	3,000.00
Total credit	$ 16,360.82

Since the total credit exceeds the revised income of $8,192.03, as above set out, no profits tax liability would be due. The income tax would then be shown as follows:

Net income as revised	$8,192.03	
Less exemption	2,000.00	
Balance taxable at 10%	$6,192.03	$ 619.20
Amount paid		5,178.33
Amount overpaid		$4,559.13

In view of the foregoing, it is submitted that this corporation should have returned to it the full amount of additional tax paid within the four years preceding the filing of this claim, viz., $3,105.65, with interest computed thereon in accordance with the provisions of existing law.

(Attach additional sheets if necessary.)

Signed:

GARBUTT OIL CO.

By FRANK GARBUTT

Sworn to and subscribed before me this 29 day of March, 1929

Martha M. Fahey

Notary Public in and for the County of Los Angeles, State of California.

(Title.)

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

EXHIBIT C

STATEMENT OF GARBUTT OIL COMPANY LOS ANGELES, CALIFORNIA FOR THE PURPOSE OF PERFECTING AND COMPLETING CLAIM FOR REFUND COVERING ALLEGED OVERPAYMENT OF INCOME TAX FOR THE CALENDAR YEAR 1919

Los Angeles, California
May 20, 1929

Hon. David H. Blair
Commissioner Internal Revenue
Washington, D. C.

Sir:

Reference is made to claim for refund in the amount of $3,105.65, filed by Garbutt Oil Company with principal place of business at Union Oil Building, Los Angeles, California, with the Collector for the Sixth District of California on or about March 29, 1929, covering overpayment of income tax alleged to have been made for the calendar year 1919. The claim was based upon the grounds that—

(a) The net income of the corporation was overstated to the extent of $12,500.00, because of the Commissioner's failure to allow a deduction for the amortization of the value of a certain contract entered into with the Union Oil Company of California, for which capital stock was issued having a par value of $250,000.00; and

(b) That the invested capital as determined by the Commissioner was overstated by reason of the Commissioner's failure to include therein any portion of the cost to the company of the above mentioned contract entered into with the Union Oil Company of California.

It now develops that a further reason exists in support of said claim for refund which is as follows:

Commencing with the year 1911 the arrangement entered into between the Garbutt Oil Company and the Union Oil Company of California, which owned 50% of said stock, was to the effect that the stockholders were to pay in to the company a sufficient amount to cover the operating expenses and they were to receive the oil produced by the company and sell it themselves. Under this arrangement the company received none of the proceeds derived from the sale of the oil, although it appears for bookkeeping purposes the oil was considered distributed to the stockholders at its market value when distributed and the difference between the expense of operation and the market value of the oil when distributed was accounted for as income to the Government.

As a matter of fact, the Garbutt Oil Company distributed assets in kind to its stockholders and they were entitled to treat the property so received as a dividend, which under the income tax law and regulations they should have accounted for at the market value of the property, in this case consisting of crude oil at its market value when received.

In this connection attention is called to statement appearing in recent letter from the Commissioner's office addressed to the Union Oil Company of California, setting forth the final adjustments made in its income and profits

tax liability for the year 1918 and subsequent years. The particular statement in the Commissioner's letter to which attention is directed appears under Schedule 1-A, and is as follows:

"The Union Oil Company owning 50% of the stock of the Garbutt Oil Company received from it each year one-half of the oil produced and paid one-half of its expenses. As the Garbutt Oil Company is a domestic corporation subject to tax on its net income the value of the oil received by the Union Oil Company in excess of expenses paid is here treated as a dividend received."

In addition to the foregoing, it is further submitted that the Internal Revenue Bureau heretofore consistently has recognized the fact that under the Revenue Acts in force prior to the Revenue Act of 1928, a corporation realizes neither profit nor loss in the distribution of its assets to its stockholders.

By eliminating the fictitious gross profits or appreciation taken up on the return of the Garbutt Oil Company for the year 1919, arising from the distribution of the oil produced in the manner hereinbefore explained, no taxable profit results, and it therefore follows that even though the specific grounds set forth in the claim for refund are denied said claim should, nevertheless, be allowed in full for the reasons herein set forth.

It is therefore respectfully urged that the amount by which the Garbutt Oil Company has overpaid its correct tax liability for the year 1919, viz., $5,178.33, or so much

thereof as is properly refundable within the statute of limitations, be refunded together with interest computed thereon as provided by existing law.

Respectfully submitted,

GARBUTT OIL COMPANY
By MOYE W. STEPHENS

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

MOYE W. STEPHENS of the City of Los Angeles, State and County aforesaid, being first duly sworn, deposes and says that he is Treasurer of the Garbutt Oil Company, a corporation with principal place of business at Los Angeles, California; that the foregoing statement is true and correct to the best of his knowledge and belief and that the same has been prepared for the purpose of perfecting and completing that certain claim for refund heretofore filed on behalf of said company for the taxable year 1919, and is to be considered as a part and parcel of said claim.

MOYE W. STEPHENS

Subscribed and sworn to before me this 23rd day of May, 1929.

FLORENA M. SAMPSELL
Notary Public in and for the County of Los Angeles, State of California.

EXHIBIT D

TREASURY DEPARTMENT
Washington

IT:AR:C-5
CAB

Aug. 12, 1929

Garbutt Oil Company,
Union Oil Building,
Los Angeles, California

Sirs:

Your claim for refund of $3,105.65 for the taxable year 1919 has been examined and will be rejected for the following reasons:

You contend that $250,000.00 capital stock issued to the Union Oil Company of California upon condition of its agreement to finance the development expenses represents the cost of a contract which is returnable through amortization over a period of twenty years from October 3, 1907.

In Paragraph 3 on Page 2 of your claim you state:

"Under contract dated November 3, 1907 it was provided that on the organization of the corporation one-half of its authorized capital stock should be issued fully paid up to the then owners of oil lease and one-half of said authorized capital stock should be issued to the Union Oil Company of California; the consideration in the first instance being the transfer of the lease to the corporation and in the second instance an agreement on the part of the Union Oil Company of California to provide the expenses of developing the property for which it was to

be reimbursed only out of any oil which might be produced."

Inasmuch as the $250,000.00 stock was exchanged with the Union Oil Company of California for a drilling contract the expenses of which were to be reimbursed to the Union Oil Company of California out of oil receipts, it is held that the taxpayer received financial assistance which had no value for depletion, amortization or invested capital purposes. The allowance of such an item would result in a double deduction of the cost of development.

You further contend that inasmuch as the taxpayer entered into an agreement with its stockholders in 1911 for said stockholders to pay into the company sufficient funds to pay the expenses and the company was to turn over to the stockholders all the oil produced for them to sell, that the Garbutt Oil Company distributed to its stockholders assets in kind and that no taxable profit accrued to the taxpayer.

This office holds that the distribution of the oil in excess of the expenses contributed represents a distribution of profits which are taxable to the corporation.

If you do not acquiesce in the proposed action relative to your claim and desire a hearing in the Unit at Washington, such hearing will be granted if written request is made therefor within twenty days from the date of this letter.

If a hearing is not requested the rejection of this claim will be officially scheduled at the expiration of the period indicated.

Respectfully,

DAVID BURNET—Deputy Com.

(By) H. B. Robinson, Head of Division.

EXHIBIT E

TREASURY DEPARTMENT

Washington

IT:AR:C-5 Nov. 13, 1929
CAB

Garbutt Oil Company,
Union Oil Building,
Los Angeles, California.

Sirs:

Your claim for refund of $3,105.65 for the taxable year 1919 has been examined in connection with the report on the conference held in this office on October 4, 1929, and will be rejected for the following reasons:

The claim is based on the ground that the $250,000.00 capital stock issued to the Union Oil Company of California upon the condition of its agreement to finance the development expenses represents the cost of a contract which is returnable through amortization over a period of twenty years from October 3, 1907, and that the unamortized portion of such contract should be included in invested capital.

It is held that the contract had no value to the corporation, inasmuch as it carried the agreement that if the

development resulted in the production of oil the money expended by the Union Oil Company of California was to be repaid out of any profit accruing to the corporation from such production. If no oil were produced no liability existed for the corporation to pay back the amount advanced. It therefore appears that the contract in case oil was produced became a liability of the corporation rather than an asset.

Your contention that the Garbutt Oil Company distributed assets in kind to its stockholders, and therefore no income accrued to the corporation was first raised in your brief dated May 20, 1929.

Under Treasury Decision 4266, Cumulative Bulletin VIII-1, Page 111, a refund or credit of any internal revenue tax will not be allowed in any case after the expiration of the statutory period of limitations applicable to the filing of the claim therefor, unless prior to the expiration of such period a formal claim has been duly filed which complies with all the requirements of the regulations applicable at the time such claim was filed.

Where, however, an informal claim has been filed prior to the expiration of such statutory period of limitations a refund or credit may be allowed after the expiration of such statutory period of limitations in any case in which such informal claim is perfected by the filing of a formal claim prior to May 1, 1929.

Under this Treasury Decision it follows that when the statutory period extends beyond May 1, 1929, an informal

claim may be perfected only by the filing of a proper claim within the statutory period of limitations. The tax sought to be refunded in the present case was paid on April 3, 1925 and the period of limitations expired on April 3, 1929. While the original claim was filed within the statutory period that claim made no reference to this contention and the supplemental brief in which the new contention was raised was filed after April 3, 1929 and after May 1, 1929, and cannot, therefore, be regarded as referring back to and becoming a part of the formal claim filed.

The rejection of your claim will officially appear on a schedule to be approved by the Commissioner.

Respectfully,

DAVID BURNET, Deputy Commissioner.

By H. B. ROBINSON

Head of Division.

EXHIBIT F

TREASURY DEPARTMENT
Washington

November 21, 1929

Office of
Commissioner of Internal Revenue

IT:C:CC—

Garbutt Oil Company,
Union Oil Building,
Los Angeles, California

In Re: Refund Claim for year 1919
Amount $3,105.65

Sirs:

Your claim for refund of taxes, above referred to, was disallowed by the Commissioner on a schedule dated November 21, 1929.

Respectfully,

DAVID BURNET,
Deputy Commissioner
By Charles O. Suman
Head of Division

[Endorsed]: Filed Nov. 20, 1931 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

ANSWER TO COMPLAINT

Comes now the defendant, The United States of America, through its attorneys Samuel W. McNabb, United States District Attorney for the Southern District of California, Ignatius F. Parker and Alva C. Baird, Assistant United States Attorneys for said District and Eugene Harpole, Special Attorney, Bureau of Internal Revenue, and in answer to Complaint of the Plaintiff on file herein admits, denies and alleges as follows:

I

The defendant admits the allegations of paragraph I of the Complaint.

II

The defendant admits the allegations of paragraph II of the Complaint except that it is specifically denied that the taxes mentioned in said paragraph were wrongfully collected

III

The defendant admits the allegations of paragraph III of the Complaint except that it is denied that there was an overpayment of taxes in any sum whatsoever or that the amount paid was in excess of the tax legally due or that any part of said tax was illegally or unlawfully collected.

IV

The defendant admits the allegations of Paragraph IV of Complaint.

V.

The defendant admits the allegations of paragraph V except that it denies that the payment of the deficiency

in tax was made by the plaintiff on June 3, 1925, and alleges instead that said payment was made on April 3, 1925.

VI.

The defendant denies the allegations of paragraph VI of the complaint on the ground that it has not sufficient knowledge or information upon which to form a belief as to the truth or falsity thereof.

VII.

The defendant denies the allegations of paragraphs VII, VIII, and IX of the complaint.

VIII.

The defendant answering paragraph X of plaintiff's complaint admits that the plaintiff filed a claim for refund with the Collector of Internal Revenue for the Sixth District of California on March 30, 1929; that the plaintiff filed the statement, a copy of which is attached to its complaint and marked Exhibit "C" on May 31, 1929, which date was more than four years after the date of the payment of the tax and that the period of limitation for filing a claim for refund had expired when said statement was filed and no proper claim referring to the grounds raised in said statement had been filed within the statutory period of limitation, or prior to May 1, 1929, and that said statement was without legal effect; that the Commissioner of Internal Revenue did, on November 13, 1929, notify the plaintiff corporation of the matters and things set forth in Exhibit "E" of the complaint, and further it is admitted that the claim for refund was disallowed in schedule dated November 21, 1929, and that Exhibit "F" of plaintiff's complaint is a copy of the

letter bearing date of November 21, 1929; that the defendant denies all of the allegations of said paragraph X not herein expressly admitted or denied.

IX

The defendant admits the allegations of paragraph XI of Plaintiff's Complaint except that it is denied that the Plaintiff is entitled to the amount claimed or any other sum whatsoever.

WHEREFORE defendant having fully answered the Plaintiff's Complaint prays that the Plaintiff take nothing by this action and that the defendant be permitted to go hence with its costs.

Samuel W. McNabb
SAMUEL W. McNABB
United States Attorney

Ignatius F. Parker
IGNATIUS F. PARKER
Assistant United States Attorney

Alva C. Baird
ALVA C. BAIRD
Assistant United States Attorney

Eugene Harpole
EUGENE HARPOLE
Special Attorney
Bureau of Internal Revenue

[Endorsed]: Received copy this 23rd day of Mar. 1932. Claude I. Parker, P. A. A. Attorneys for plaintiff. Filed Mar. 23, 1932, R. S. Zimmerman Clerk, By Theodore Hocke, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

WAIVER OF JURY TRIAL

IT IS HEREBY STIPULATED AND AGREED between the parties to this cause that a jury trial is waived and that the cause be submitted to the Court for decision without the aid or intervention of a jury.

Dated at Los Angeles, California, this 27th day of March, 1935.

Claude I. Parker
George H. Koster
Bayley Kohlmeier
Attorneys for Plaintiff

Peirson M. Hall—E. H.
U. S. Attorney

Eugene Harpole
Attorneys for defendant

It is so ordered. Mar 27 1935

Hollzer
Judge

[Endorsed]: Filed Mar. 29, 1935, R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

STIPULATION OF FACTS

In addition to the facts submitted by the pleadings, the parties hereto, through their respective counsel, hereby stipulate and agree that the following facts are true:

I.

That no other action has been had on the claims sued upon in the above entitled suits, in Congress or any department of the Government, or any Court; that plaintiff is the sole owner of said claims here sued upon; that plaintiff has made no transfer or assignment of said claims or any part or parts thereof.

II.

That plaintiff has at all times borne true allegiance to the Government of the United States of America and has not in any way aided or abetted or given encouragement to rebellion against the Government or at any time aided or abetted in any manner or given comfort to any sovereign or government that is or ever was at war with the United States.

III.

That on April 3, 1925 the plaintiff duly paid to the then Collector of Internal Revenue at Los Angeles, California a tax deficiency in the amount of $3,105.65 which had

been assessed against this plaintiff as an additional tax for the calendar year 1919, as alleged in Paragraph V. of the complaint filed in case No. 5094-H.

IV.

That after the payment by the plaintiff corporation of the deficiency in tax for the year 1919 in the amount of $3,105.65, as aforesaid, the plaintiff corporation did, on March 30, 1929, file with the Collector of Internal Revenue at Los Angeles, California, its claim for refund of $3,105.65 of its taxes for the calendar year 1919. A true and correct copy of said claim for refund is attached to the plaintiff's complaint in case No. 5094-H and marked Exhibit B.

V.

That under date of August 12, 1929, the Deputy Commissioner of Internal Revenue addressed a letter to the plaintiff, a true copy of which letter is attached to the plaintiff's complaint in case No. 5094-H and marked Exhibit D.

VI.

That under date of November 13, 1929 the Deputy Commissioner of Internal Revenue gave notice of intention to reject the plaintiff's claim for refund. A true copy of the letter of the intention to reject is attached to plaintiff's complaint in case No. 5094-H and marked Exhibit E.

VII.

That under date of November 21, 1929 the Deputy Commissioner of Internal Revenue notified the plaintiff

by letter that its refund claim was rejected. A true copy of said letter of November 21, 1929 is attached to plaintiff's complaint in case No. 5094-H and marked Exhibit F.

VIII.

That the plaintiff corporation was incorporated under the laws of the State of California in 1907. On October 3, 1907 it, as lessee, executed a lease of certain oil property. (A true copy of said lease is hereto attached, marked Exhibit 1, and hereby made a part hereof). Oil was discovered on this property and the only business engaged in by the plaintiff during the years involved in these proceedings was in connection with the production and disposition of oil produced from this property.

IX.

That on April 10, 1911 the Board of Directors of the plaintiff corporation adopted a resolution, a true and correct copy of which is hereto attached, and marked Exhibit 2, and hereby made a part hereof.

X.

That on its books and income tax returns the plaintiff corporation adopted a system of recording the oil produced at its market value and treated the difference between that value and the cost of producing the oil as income. The Commissioner of Internal Revenue likewise adopted this method and treated the income so computed as taxable income.

It is further agreed that either party may introduce other evidence not inconsistent with the facts herein stipulated.

Claude I. Parker
George H. Koster
Bayley Kohlmeier
Attorneys for Plaintiff.

Peirson M. Hall—E. H.
United States Attorney.

Ernest R. Utley—E. H.
Assistant U. S. Attorney

Eugene Harpole
Attorneys for Defendant.

DATED: April 1935.

EXHIBIT 1

THIS LEASE, Made and entered into this 3rd day of October, 1907, between MARGARITA GUIRADO DALLUGGE, MARTIN C. MARSH, ADOLPH RAMISH, and ALBERT M. STEPHENS, herein denominated Lessors, and the "Garbutt Oil Company, a corporation duly organized and existing under the laws of the state of California, herein denominated the Lessee WITNESSETH:

I.

That for and in consideration of the sum of One Dollars lawful money of the United States, paid by the Lessee to the Lessors, and other good and valuable considerations, the receipt whereof is hereby acknowledged, and in consideration of the covenants and agreements herein contained, the Lessors have leased, let and demised, and do hereby lease, let and demise unto the Lessee, and the Lessee hereby takes and accepts from the said Lessors, for the period of ten years from this date, the sole and exclusive right and privilege of drilling, operating for and developing by means of bored wells, liquid petroleum, oil and gas only, in and upon and from the lands hereinafter described.

II.

The term "liquid petroleum" hereinbefore used, is defined to be that petroleum product which can be obtained by boring wells and which can be removed by pumps through and by means of bored wells, and this lease shall

not be construed as giving to the Lessee the right or privilege of taking such or any product by any other means than by bored wells.

III.

The Lessors also give to the Lessee the right to remove said substances from the said land, and the right to use so much of the surface as may be necessary for that purpose. Also the right of entry upon the premises hereinafter described for such purposes, and the right of way for necessary pipe lines for removing such oil as may be discovered upon said premises, and for carrying water to be used about said wells, and also the privilege of erecting such telephone lines as may be

necessary for carrying on said business. Any pipe lines which shall be located upon said premises shall be laid in trenches of a uniform depth of not less than eighteen (18) inches, except such lead lines as do not interfere with the cultivation of the soil. Lessee to be liable for any damage to land caused by bursting or breaking of pipes. Sump holes to be constructed in a substantial manner.

The lessee in exercising the rights granted by this clause of the lease, agrees that it will so exercise the same as to cause the least possible interference with the cultivation of the soil upon the premises by the Lessors and their tenants.

IV.

Lessee agrees that it will forthwith, with diligence and despatch, commence operations with two rigs, for drilling on said premises, and that it will with diligence and despatch, inevitable delays excepted, prosecute the drilling of two wells to a depth of 2,000 feet in each well, unless oil shall be discovered in paying quantities at a less depth than 2,000 feet.

V.

Should the Lessee succeed in obtaining oil in paying quantities in either of said two wells hereinbefore agreed to be bored, then and in that event it agrees that it will continue boring wells with at least two outfits upon said premises, and will proceed diligently and continuously operating both of said outfits in boring wells, until at least one producing well has been obtained upon every five acres of oil producing land upon said premises.

VI

It is hereby agreed and understood by the parties hereto that in case the said Lessee fails to obtain oil in paying quantities in any well or wells to be drilled as hereinbefore agreed, ~~witoin the said period of three years,~~ it will then execute a cancellation and surrender of this lease, duly acknowledge and deliver the same to the Lessors.

VII.

At the expiration of three (3) years from the abandonment or

successful completion of the first well, the Lessee will release and quitclaim from the effect of this lease, all the leased premises except such portion thereof as shall have been by actual operations at that time demonstrated to be oil producing in paying quantities, and thereafter the Lessee shall not have the privilege of boring any further wells upon the said premises, except upon that portion thereof so demonstrated to be oil producing land.

VIII.

It is hereby agreed and understood that at the expiration of this lease, or the cessation of the right to drill, as herein defined, all wells that are then producing oil may be retained and operated by the Lessee for a further period not exceeding ten (10) years, on the same terms as to royalty, and all other conditions herein specified, and that all the rights for water, rights of way, pipe lines for oil and telephone lines herein specified as may be necessary to operate said wells and conduct such business, may be retained and operated so long as such wells continue in paying quantities, not exceeding said additional period of ten years. And the Lessee shall have the right to do such acts and things as may be necessary to keep said wells in productive condition, including the right to ream, clean out, deepen, or re-drill, within a radius of 25 feet of any producing well, to maintain or increase production.

IX.

And while said Lessee operates said well or wells under the terms of this lease, after having surrendered a part

of the premises, the Lessors will not drill, or permit others to drill or operate for oil within the demised premises, nearer than two hundred fifty (250) feet of any well so operated. And it is further understood and agreed that after the expiration of the first period of ten (10) years, the right to operate any wells shall cease absolutely so soon as the said wells shall fail to produce oil in paying quantities.

(3)

X.

If at any time during the operation of this lease, after boring three wells, it shall result that it is unprofitable to bore any more wells upon the said property, party of the second part herein shall have the privilege of releasing to the Lessors all of the said leased premises, except such parts thereof as are occupied by producing and profitable wells, and thereupon this lease shall be terminated and annulled except as to such wells as may then be operating under this lease.

XI.

The Lessee further agrees to continuously operate and pump all wells in which oil may be developed, and to use only so much of said land as may be necessary for the purposes of this lease; to allow the Lessors, their agents or attorneys, the right to inspect the said tanks, wells, the books of said Lessee, and all records as to the production of oil from said territory, at any time during the term of this lease; to render monthly statements of

the production of oil, other than oil used for fuel on said premises in the operation of its plants, to the said Lessors on or before the 15th day of every calendar month on and after the completion of the first oil well; to deliver to the Lessors at the tanks upon the premises—said tanks to be erected by the Lessee—the gross one-sixth (1/6) part of all the oil they may produce and save from said land; or, the Lessors agreeing thereto, the whole production of said oil wells may from time to time be shipped to market and sold by the Lessee with its product, for and on account of the Lessors and the Lessee, in which event the Lessee agrees to pay the Lessors for their royalty on the 15th day of each month for the oil sold during the preceding calendar month. It is provided, however, that before paying the royalty to the Lessors, there shall be deducted from the total production that quantity of oil which shall be required and actually used for fuel pur-

(4)

poses in said mining and drilling operations.

XII.

It is further provided that if the Lessee shall lay any conduit for the purpose of conducting oil from the said wells on said premises, or over said premises, then the Lessee will carry in such conduits the proportion of the oil belonging to the Lessors, whether they take it in kind or whether it be sold together with the oil of Lessee, without cost or charge for such transportation; and if the Lessee shall become interested, directly or indirectly, in the construction of any conduits for the purpose of taking oil or gas from the said premises, and from the said well or other wells in the said neighborhood, then

the Lessee will conduct or cause to be conducted the portion of oil belonging to the Lessors, whether they take it in kind, or whether the same be sold with that of the Lessee, and will deliver the same at the output of such conduit to the Lessors in suitable receptacle, on the same terms and conditions as are charged to and imposed upon the oil of the Lessee.

XIII.

The Lessors shall have the privilege of changing from time to time the method of taking in the manner hereinbefore specified, said royalty, and said change shall be made, if the same is desired, *to* as to take effect on the first of each calendar year, and the method thus determined by the Lessors shall continue during the calendar year—such change of method to be indicated in writing by the Lessors to the Lessee.

It is provided, however, that for a period of two years from this date, the Lessors will not take their royalty in kind, but the same shall be disposed of by the Lessee with its own oil, and the

Lessee agrees that during the period of time aforesaid, it will pay to the Lessors for all royalties to which they are entitled under this lease, the price at which the oil may be sold by the Lessee to the Union Oil Co. for such period, but the Lessee guarantees that such price shall at no time during the said period be less than 50¢ per barrel net to the Lessors, at the wells.

XIV.

It is agreed and understood that the Lessee shall have the right to use such water as may be required for the

purpose and use of drilling and pumping, or other operations on the premises.

It is also agreed and understood that excepting for such purposes, all water now developed or hereafter to be developed, upon said premises, shall be and become the property of the said Lessors, and in the event of the abandonment of any or all wells, the Lessors shall have the full and free use of all water flowing therefrom, except so much as Lessee may use for its said operations on the leased premises.

It is also agreed and understood that nothing herein contained shall prevent the use and occupation of said lands by the said Lessors or their assigns in any part or parts of said land (or their tenants) for agricultural and stock raising purposes, or residences or houses, provided that such occupation and use shall not interfere with the possession of said Lessee for the purposes of drilling and operating as hereinbefore and hereinafter set forth.

Lessors reserve the right to grant rights of way to railroads across said property, and also, after the expiration of three years, reserve the right to lay out streets across the same, and to subdivide the whole or any portion of said property.

It is understood, however, that any streets, railroads, buildings or improvements to be hereafter erected or constructed upon said premises, shall not trespass upon or interfere with the use or operation of any wells which may have been bored under this lease; and it is further

understood that after any railroads, houses or building improvements may be placed upon said premises, the Lessee will not bore any well nearer than fifty (50) feet to such improvements, houses or railroads.

XV.

Under this agreement a well shall be deemed a producing well in paying quantities whenever the same will produce, being diligently pumped, five barrels per day.

XVI.

Should it result in the boring of said wells that the oil to be pumped therefrom is of greater value than the gas flowing therefrom, if any such does flow, then and in that event, all of the gas produced by any such wells shall belong to the Lessors as part consideration for the lease of the said premises, and in that event, the Lessors will have access to said wells, if they so desire, for the purpose of collecting the gas emanating from said well or wells, with the right to conduct the same therefrom in any direction or directions as they may see fit, by pipes.

XVII.

Should, however, any of said wells so bored at the time of their several completion prove more valuable as a gas well than as an oil well, and if the same be operated for the production of gas, then the lessee is to have and receive two-thirds (2/3) of such gas, together with its due proportion of the oil, and the Lessors shall have one-third (1/3) of the gas, together with their due proportion of oil.

XVIII.

Should it be determined upon the completion of any of said wells that the same are unprofitable for oil or gas,

the Lessee shall have the privilege, within ninety (90) days, of drawing the pipes and removing all machinery and fixtures placed thereon by them, and also shall at the expiration of the lease, they having fully performed the conditions and obligations imposed upon them herein,—have the same privilege of removing the said pipes and machinery.

(7)

XIX.

It is further agreed, however, that the Lessors, upon the abandonment of any well by the Lessee, or upon its forfeiture of the right to operate the same, or upon the termination of this lease of ten (10) years, or the extension thereof for the further period of ten (10) years upon any one or more of said wells, shall have the option of purchasing any or all casing, pipes, or other fixtures, or either of them, placed in any well or wells, at the market price of such articles at the time of such purchase in Los Angeles. And the Lessee before the abandonment of any well, or before the drawing of any pipe from any such well, will give the Lessors prior written notice of ten (10) days of its intention to abandon such well or draw such pipe, in order that the Lessors may exercise the option of purchasing the above articles.

XX.

It is further agreed that in every case where a well is abandoned, the Lessee shall take such precautions as are proper under the circumstances to prevent the admixture of water with any oil strata which may be discovered in the well.

XXI.

It is agreed that the Lessee shall not, without the written consent of the Lessors first obtained, assign this lease, nor underlet any part thereof.

XXII.

The Lessee agrees that it will pay all taxes which may be assessed upon the machinery, tanks, and personalty used in connection with the operations upon said premises, and that it will pay all taxes hereafter levied upon the said premises during the term of this lease in excess of the taxes of this year levied and assessed against the same, in so far as said excess is caused by the production of oil thereon.

XXIII.

This is a lease, and not a mining partnership in any sense of the term, the parties hereto bearing to each other strictly the relation of landlord and tenant, and no other relation.

XXIV.

The strict and faithful performance of each and all of the covenants and agreements herein assumed by the Lessee are conditions of this lease, and upon its failure for thirty days after notice in writing so to do by the said Lessors, to faithfully keep and perform any one or the said covenants or agreements, this lease shall be forfeited and the Lessors shall be entitled to enter upon and exclude the Lessee from the said premises, and after such entry the Lessee shall be released from future obligations under this lease.

XXV.

The Lessors reserve the right to use, occupy and cultivate every part of said premises not actually required to be used by the Lessee in the performance of its covenants herein contained, and the exercise of its rights hereby granted.

XXVI.

Lessee agrees to pay all expenses and charges of every character in the fulfillment of the terms of this agreement, and to hold the said property free of all claims, demands and liens of every character which may be incurred by reason of its operations under this lease.

XXVII.

At the termination or legal cancellation of this lease upon the whole of said premises, or any part thereof, the Lessee will execute, acknowledge and deliver to the Lessors a formal release of that portion so cancelled or surrendered.

XXVIII.

With respect to the obligations herein assumed by the Lessee, time is of the essence of the contract, and the obligations herein assumed by it shall be held and construed as conditions precedent.

(9)

XXIX.

This lease is made subject to an agricultural lease to William Hill, which lease expires December 1, 1907, and has been exhibited to the Lessee herein. Should anything become due under the said lease to the said Hill for the occupation of land in boring for oil, the Lessors will pay the same to the Lessee.

XXX.

The Lessors herein reserve the right to bore for water upon said premises, and will report from time to time the character of the soil penetrated by such wells, and if at any time oil shall be found in any such well, the well shall be turned over to the Lessee herein, if it so desires, it paying the actual cost of the boring of said well.

XXXI.

The property covered by this lease is described as follows, to wit:

Being a part of the Rancho La Brea, in the county of Los Angeles, State of California, and being a part of that tract of land conveyed by Samuel R. Hancock to Bernardino Guirado and Albert M. Stephens, on the 28th day of December, 1899, by deed recorded in Book 1349, page 61 of Deeds.

The portion of said land covered by this lease is all that portion thereof bounded on the west by the lands of Wm. Niles, on the south by Fourth Street, on the east by lands of Gilmore, and on the north by an east and west line drawn from the northwest corner of said Gilmore's land to the eastern boundary line of the land of said Niles.

There is a mortgage of $13,000 existing upon the above described property, which the Lessors obligate themselves to hold the Lessee harmless from, and to pay the interest thereon promptly as the same becomes due, and the principal at maturity.

XXXII.

If property adjoining the leased premises on the east, south or west shall be drilled for oil, and oil shall be developed by such drilling, then as soon as such oil shall be developed, and within a reasonable time thereafter, the Lessee herein agrees that it will bore upon the leased premises well or wells so located and distributed as to secure for the parties hereto the oil lying underneath the leased premises nearest the point of development on such adjoining lands; provided, however, that this provision shall not be construed as requiring the Lessees to place any additional rigs upon the said property for the purposes of development thereof.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands the day and year first above written.

Margarita Guirado Dallugge
Adolph Ramish
Martin C. Marsh by A Ramish
Albert M. Stephens
The Garbutt Oil Company

By Frank A Garbutt
President

And Moye W. Stephens
Secy.

EXHIBIT 2

A meeting of the Board of Directors of the Garbutt Oil Company was held at the office of the Company, Room 530 Wilcox Building, Los Angeles, Monday, April 10th, 1911, at 11:00 o'clock A. M.

Those present were, Messrs. W. L. Stewart, Adolph Ramish, R. A. Dallugge.

The following resolution was made, seconded and unanimously carried:

BE IT RESOLVED that the oil produced by this company since the first of January, 1911, shall be assigned to the lessors to the extent of their royalty, and to the stockholders to the extent of their holdings of stock, in the proportions to which they are severally entitled to receive it,—in kind; so long as the stockholders severally pay calls of the superintendent and secretary for money necessary to cover all expenses of the Company, said calls for money to be paid by the 14th day of each month for the expenses of the current month; and if any stockholder shall fail to pay his proportion for such current expenses, then the right of such stockholder to receive such oil in kind shall cease, and shall pass back to the company.

BE IT FURTHER RESOLVED that this arrangement shall continue for the remainder of the calendar year 1911.

BE IT FURTHER RESOLVED that if the stockholders Mrs. Dallugge, Adolph Ramish and Martin C.

Marsh shall request the same, this corporation, without further action on the part of its Board, shall enter into a contract with the Union Oil Co. for the sale of its oil, for the period expiring March 1, 1914, upon the same terms and conditions as expressed in a contract signed by the Albert M. Stephens Co. with the Union Oil Co., and now in the possession of said Union Oil Co.; and in the event that the said stockholders shall so request, then the President and Secretary of this corporation are hereby authorized, directed and empowered in the name and under the seal of this corporation, to enter into such contract on behalf of this corporation, with the Union Oil Co.

The oil so assigned to the several shareholders of the corporation is to be assigned to them in the tanks of the corporation, and the expense of delivery from the tanks of the corporation is to be charged against each individual so receiving his oil, in severalty.

The meeting then adjourned.

MOYE W. STEPHENS, Sec'y.

[Endorsed]: Filed Apr. 4, 1935 R. S. Zimmerman, Clerk By M. R. Winchell, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

Memorandum of Conclusions, Judge Hollzer,
Dec. 31, 1935

It appearing that within the time allowed by law for the filing of a refund claim, plaintiff filed with the Collector of Internal Revenue its claim for refund of $3,105.65 of its taxes for the calendar year 1919, a true copy of which claim is attached to the complaint herein and marked Exhibit B, that the sole ground upon which such refund was sought was the contention that the taxpayer was entitled to a deduction for amortization of the cost of a drilling; and

It further appearing that after the expiration of the period of limitation within which such a refund claim might be filed, but before the Commissioner had ruled upon its claim as originally presented, plaintiff filed an amended claim based upon the ground that it realized no taxable income during the calendar year 1919; and

It further appearing that in its claim for refund as originally filed plaintiff conceded that for income tax purposes it was chargeable with income in a sum representing the difference between the market value of oil produced through the operation of its oil lease and the cost of producing such oil, whereas by the filing of the amended claim for refund, plaintiff took the inconsistent position to the effect that, since all oil produced by it was distrib-

uted to its stockholders in kind, plaintiff realized no taxable income during the calendar year 1919;

The court concludes that the filing of plaintiff's so-called amended claim did not constitute an amendment, but in effect an abandonment of its original claim, and the same having been filed after the expiration of the period allowed for the filing thereof, plaintiff's right to sue herein is barred for the reason that such claim was filed too late.

Counsel for defendant are directed to prepare and serve proposed findings and judgment in conformity with this memorandum and to incorporate therein a recital allowing an exception for plaintiff.

(Copies to counsel)

[Endorsed]: Filed Dec. 31, 1935 R. S. Zimmerman, Clerk By M. R. Winchell, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled case came on regularly for trial on the 4th day of April, 1935, before the Court, sitting without a jury, a trial by jury having been waived by written stipulation of the parties thereto; plaintiff appearing by Claude I. Parker and Bayley Kohlmeier, Esquires, and the defendant appearing by Peirson M. Hall, United States Attorney for the Southern District of California, Alva C. Baird, Assistant United States Attorney for said district, and Eugene Harpole, Special Attorney, United States Internal Revenue Bureau, and evidence, both oral and documentary, having been received and the Court having fully considered the same, hereby makes the following Special Findings of Fact:

FINDINGS OF FACT

I

That the Plaintiff is and, during all of the time pertinent to this action, was a California corporation, and the Defendant a sovereign body politic.

II

That on March 15, 1920, the Plaintiff filed its income and profits tax return for the calendar year 1919 with the Collector of Internal Revenue at Los Angeles, California, disclosing a tax of $2,072.68, which sum was paid in installments according to law in the year 1920.

III

That upon the audit of Plaintiff's income and profits tax return for the calendar year 1919 the United States Commissioner of Internal Revenue determined and assessed an additional tax in the sum of $3,105.65 against the plaintiff for said year.

IV

That Plaintiff paid the additional tax in the sum of $3,105.65 assessed against it for the calendar year 1919 on April 3, 1925.

V

Thereafter and on the 30th day of March, 1929, Plaintiff filed a claim for refund of the sum of $3,105.65 paid by it as additional taxes for the calendar year 1919, wherein it set out the following reasons why said claim should be allowed:

"The amount set out on line three above represents income and profits tax assessed against claimant for the calendar year 1919 and made up as follows:

Assessed on original return	$2,072.68
Additional assessed on basis of Commissioner's audit	3,105.65
	$5,178.33

The tax assessed on the original return was paid within the year 1920 and the additional tax was paid with check drawn in favor of the Collector of Internal Revenue at

Los Angeles, California, dated March 31, 1925. It is now contended that the whole amount of additional tax paid should be refunded for the reasons set out below.

According to information given by the Commissioner in his letter addressed to claimant corporation under date of August 18, 1927 the additional tax liability was determined as follows:

'Net income as disclosed by return	$ 16,928.61
As corrected	20,692.03

Additional income:

(a) Excessive depletion	$ 3,763.42

Explanation of Item changed

(a) Excessive depletion—	
March 1, 1913 value of lease	$126,932.00
Estimated recoverable reserves	507,728 bbls.
Production for year	44,099
Depletion sustained	$ 11,024.75
Depletion taken	14,788.17
Excessive depletion	3,763.42

In view of the fact that the profits tax as computed under Section 302 of the Revenue Act of 1918 is in excess of the tax as computed under Section 301 of the same Act, you have been given the benefit of the computation of tax under Section 302.

Computation of Tax, 1919 Rates

Excess Profits Tax

Section 302			Tax
Net income for year		$20,692.03	
Less:			
Amount taxable @ 20%	$17,000.00		$3,400.00
Amount taxable @ 40%	692.03	20,692.03	276.81
Excess profits tax			$3,676.81

Income Tax

Net income taxable year		$20,692.03	
Less:			
Exemption	$ 2,000.00		
Excess profits tax	3,676.81	5,676.81	
Balance taxable at 10%		$15,015.22	
Income tax			$1,501.52
Total income and profits tax			$5,178.33
Previously assessed			2,072.68
Additional to be assessed			$3,105.65

Exception is taken to the Commissioner's determination of taxable net income and to his computation of the excess profits tax under Section 302 of the Revenue Act of 1918 rather than under the provisions of Section 301 based on allowable invested capital.

As to the determination of net income it is contended that said net income was overstated to the extent of $12,500.00, by reason of the following:

This corporation was organized during the latter part of the year 1907 with an authorized capital stock of $500,000.00. Under contract dated November 3, 1907, it was provided that on the organization of the corporation one-half of its authorized capital stock should be issued fully paid up to the then owners of an oil lease and one-half of said authorized capital stock should be issued to the Union Oil Company of California. The consideration in the first instance being the transfer of the lease to the corporation and in the second instance an agreement on the part of the Union Oil Company of California to provide the expenses of developing the property for which it was to be reimbursed only out of any oil which might be produced.

Although the agreement referred to provided that an equal amount of the Company's capital stock should be set up for the lease and contract, viz.: $250,000.00 of par value, said assets were taken up on the books as follows:

Contract with Union Oil Co.	$250,000.00
Lease	187,500.00
Stock Discount	62,500.00
Total—	$500,000.00

However, the Commissioner has apparently conceded that the lease cost claimant corporation $250,000.00. In this connection reference is made to letter addressed to claimant corporation by the Commissioner relative to the determination of its tax liability for the year 1918, said letter being dated February 3, 1925, IT:CR:G-2-MPS. In said letter the adjustments with respect to invested capital are set forth as follows:

'Invested capital as disclosed by return	$391,551.54
As corrected	28,364.50
Deductions	$363,187.04

Deductions:

(a) Stock discount disallowed	$ 43,750.00
(b) Contract with Union Oil Co. disallowed	250,000.00
(c) Value of lease decreased	69,347.79
(d) 1917 taxes prorated	89.25
Total deductions	$363,187.04

(a) Stock discount disallowed $43,750.00

Discount on the sale of capital stock is not allowable as invested capital.

(b) Contract with Union Oil Company disallowed $250,-000.00.

Inasmuch as this contract had no value as at January 1, 1918, it is not allowable for invested capital purposes.

(c) Value of lease decreased $69,347.79.

Value as shown on return	$133,093.54
Value as corrected based on cost less depletion	63,745.75
Decrease	$ 69,347.79

(d) 1917 taxes prorated $89.25

The tax due for 1917 in the amount of $162.87 is prorated from invested capital for 200 days as follows:

$162.87 multiplied by 200/365 equals $89.25.'

From the foregoing it is apparent that an undepleted cost of $63,745.75 for the lease has been determined as of January 1, 1918. Based on the assumption that the Commissioner has allowed $250,000.00 as the original cost of the lease when acquired by the corporation in 1907, and since an equal amount of capital stock was issued to the Union Oil Company of California for entering into the contract, it is concluded that the same cost should be assigned for the contract as was allowed for the lease. It is submitted that the said contract was valuable to claimant corporation throughout the entire life of the lease and that it was in error in writing same off its books during the year 1918.

Had it not been for the contract whereby the Union Oil Company of California agreed to develop the property and take a chance of securing reimbursement for the cost of such development, if, and when, oil was produced from the property, it might not have been possible for claimant corporation to have provided funds for the development

of its property, thereby enabling it to realize an income from said property during the life of the lease. It is therefore contended that whatever cost is assigned to the contract should be ratably spread over the period of the lease. On this basis the cost of said contract should be amortized over a twenty-year period and one-twentieth (1/20) thereof should be allowable as a deduction for each year of said period. By using a cost for the contract of $250,000.00, the allowance for amortization applicable to the year 1919 would be $12,500.00. It is therefore submitted that the net income determined by the Commissioner for the year 1919 should be reduced to the extent of $12,500.00, thereby making a revised net income of $8,192.03.

The invested capital as shown on the return filed by claimant for the year 1919 was $133,842.38. In the balance sheet as of January 1, 1919, attached to said return, the lease was shown at $118,305.37. No cost is shown on said balance sheet for the contract with the Union Oil Company of California, neither is the stock discount of $43,750.00 shown as an asset. Therefore, in order to bring the invested capital for the year 1919 to the same basis as was determined by the Commissioner for the year 1918, the following adjustments should be made:

As an unreturned cost was determined for the lease by the Commissioner as of January 1, 1918 of $63,745.75, and a depletion was allowed for said year of $10,647.50, the unreturned cost for the lease as of January 1, 1919 would be $53,098.25, as compared to the $118,305.37 shown by the company's balance sheet as of January 1, 1919, so that a reduction in the invested capital as claimed on this account should be $65,207.12.

Since the unamortized cost of the contract with the Union Oil Company is not reflected in the invested capital as claimed by the corporation, it is submitted that in line with the above contentions the original cost of said contract less accumulated amortization down to January 1, 1919 should be included as a part of the company's invested capital for the year 1919. The addition to invested capital on account of this contract would be determined as follows:

Original cost of contract	$250,000.00
Less amount returnable through amortization October 3, 1907 to Dec. 31, 1918 (11 years and 3 months)	140,625.00
Unreturned cost	$109,375.00

On the basis of the foregoing a revised invested capital would be arrived at as follows:

Amount claimed on the return	$133,842.38
Less excessive cost of lease eliminated	65,207.12
Difference	$ 57,635.26
Plus unreturned cost of contract, as above	109,375.00
Revised invested capital	$167,010.26

Excess Profits Credit:

8% of $167,010.26	$ 13,360.82
Special exemption	3,000.00
Total credit	$ 16,360.82

Since the total credit exceeds the revised income of $8,192.03, as above set out, no profits tax liability would be due. The income tax would then be shown as follows:

Net income as revised	$8,192.03	
Less exemption	2,000.00	
Balance taxable at 10%	6,192.03	$ 619.20
Amount paid		5,178.33
Amount overpaid		$ 4,559.13

In view of the foregoing, it is submitted that this corporation should have returned to it the full amount of additional tax paid within the four years preceding the filing of this claim, viz., $3,105.65, with interest computed thereon in accordance with the provisions of existing law."

VI

That thereafter and on the 31st day of May, 1929, Plaintiff filed an instrument entitled "Statement of Garbutt Oil Company, Los Angeles, California, for the Purpose of Perfecting and Completing Claim for Refund Covering Alleged Overpayment of Income Tax for the Calendar Year 1919", with the United States Commissioner of Internal Revenue wherein the following reasons for allowance of the refund claimed were advanced:

"Los Angeles, California,
May 20, 1929

Hon. David H. Blair
Commissioner Internal Revenue
Washington, D. C.

Sir:

Reference is made to claim for refund in the amount of $3,105.65, filed by Garbutt Oil Company with principal place of business at Union Oil Building, Los Angeles, California, with the Collector for the Sixth District of California on or about March 29, 1929, covering overpayment of income tax alleged to have been made for the calendar year 1919. The claim was based upon the grounds that

(a) The net income of the corporation was overstated to the extent of $12,500.00, because of the Commissioner's failure to allow a deduction for the amortization of the value of a certain contract entered into with the Union Oil Company of California, for which capital stock was issued having a par value of $250,000.00; and

(b) That the invested capital as determined by the Commissioner was overstated by reason of the Commissioner's failure to include therein any portion of the cost to the company of the above-mentioned contract entered into with the Union Oil Company of California.

It now develops that a further reason exists in support of said claim for refund which is as follows:

Commencing with the year 1911 the arrangement entered into between the Garbutt Oil Company and the

Union Oil Company of California, which owned 50% of said stock, was to the effect that the stockholders were to pay in to the company a sufficient amount to cover the operating expenses and they were to receive the oil produced by the company and sell it themselves. Under this arrangement the company received none of the proceeds derived from the sale of the oil, although it appears for bookkeeping purposes the oil was considered distributed to the stockholders at its market value when distributed and the difference between the expense of operation and the market value of the oil when distributed was accounted for as income to the Government.

As a matter of fact, the Garbutt Oil Company distributed assets in kind to its stockholders and they were entitled to treat the property so received as a dividend, which under the income tax law and regulations they should have accounted for at the market value of the property, in this case consisting of crude oil at its market value when received.

In this connection attention is called to statement appearing in recent letter from the Commissioner's office addressed to the Union Oil Company of California, setting forth the final adjustments made in its income and profits tax liability for the year 1918 and subsequent years. The particular statement in the Commissioner's letter to which attention is directed appears under Schedule 1-A, and is as follows:

'The Union Oil Company owning 50% of the stock of the Garbutt Oil Company received from it each year one-half of the oil produced and paid one-half of its expenses. As the Garbutt Oil Company is a domestic corporation subject to tax on its net income the value of the oil received

by the Union Oil Company in excess of expenses paid is here treated as a dividend received.'

In addition to the foregoing, it is further submitted that the Internal Revenue Bureau heretofore consistently has recognized the fact that under the Revenue Acts in force prior to the Revenue Act of 1928, a corporation realizes neither profit nor loss in the distribution of its assets to its stockholders.

By eliminating the fictitious gross profits or appreciation taken up on the return of the Garbutt Oil Company for the year 1919, arising from the distribution of the oil produced in the manner hereinbefore explained, no taxable profit results, and it therefore follows that even though the specific grounds set forth in the claim for refund are denied said claim should, nevertheless, be allowed in full for the reasons herein set forth.

It is therefore respectfully urged that the amount by which the Garbutt Oil Company has overpaid its correct tax liability for the year 1919, viz., $5,178.33, or so much thereof as is property refundable within the statute of limitations, be refunded together with interest computed thereon as provided by existing law.

Respectfully submitted,

GARBUTT OIL COMPANY
By MOYE W. STEPHENS.

V

That Plaintiff predicates its right to recover in this action upon reasons set forth for the first time in the statement filed on May 31, 1929.

VI

As to the extent recited in his letter of August 12, 1929, the Commissioner of Internal Revenue undertook to treat the supplemental statement filed by the plaintiff corporation with him on May 31, 1929, as a valid amendment of plaintiff's original claim for refund of 1919 filed with the Commissioner on March 30, 1929, and also undertook to consider on their merits the contentions and grounds advanced by plaintiff in its supplemental statement of May 31, 1929; that in said letter dated August 12, 1929, the Commissioner made the following statements:

"You further contend that inasmuch as the taxpayer entered into an agreement with its stockholders in 1911 for said stockholders to pay into the company sufficient funds to pay the expenses and the company was to turn over to the stockholders all the oil produced for them to sell, that the Garbutt Oil Company distributed to its stockholders assets in kind and that no taxable profit accrued to the taxpayer.

"This office holds that the distribution of oil in excess of the expenses contributed represents a distribution of profits which are taxable to the corporation.

VII

That on October 3, 1907, plaintiff acquired a lease of certain oil property. That during the year 1919 plaintiff's only business activity was the production of oil from said leased property.

VIII

That on the 10th day of April, 1911, plaintiff corporation by its Board of Directors duly adopted a resolution providing in effect that all oil produced by plaintiff after

January 1, 1911, should be assigned to plaintiff's lessors upon the aforementioned lease to the extent of their royalty and to plaintiff's stockholders to the extent of their holdings of stock pro rata in kind so long as the stockholders should pay calls for money necessary to cover all expenses of plaintiff. That said resolution remained in full force and effect at all times subsequent to April 10, 1911, to and including the entire year 1919. That pursuant to said resolution all oil produced by plaintiff during the calendar year 1919 was distributed in kind respectively to the lessors to the extent of their royalty and to the stockholders in proportion to their holdings of stock.

CONCLUSIONS OF LAW

I

That the statement filed by Plaintiff on May 31, 1929, did not constitute an amendment of its claim for refund of additional taxes paid for the calendar year 1919 filed on March 30, 1929, but did amount to an abandonment of the reasons advanced in said claim for the allowance of the refund claimed therein.

II

That the plaintiff was barred at all times subsequent to April 3, 1929, from filing a claim for refund of the additional tax paid for the year 1919 on April 3, 1925, by the provisions of Section 284(b) of the Revenue Act of 1926.

III

That Plaintiff, by reason of its having for the first time raised the contention that it realized no taxable income during the calendar year 1919 subsequent to the expiration of the period allowed by Section 284(b) of the Rev-

enue Act of 1926 for filing a claim for refund and having abandoned all of the reasons set forth in its claim for refund filed on March 30, 1929, is barred by the limitation of said statute from recovery in this action.

IV

That during the calendar year 1919, Plaintiff realized nothing from the production and distribution of oil and did not discharge any liability thereby and realized no taxable income.

V

The Defendant is entitled to judgment against Plaintiff for its costs.

Approved and adopted this 10 day of March, 1936, with an exception allowed to Plaintiff; and an exception is allowed the Defendant as to the adoption of Conclusion of Law numbered IV.

Hollzer
UNITED STATES DISTRICT JUDGE

Approved as to Form as required by Rule 44:

Bayley Kohlmeier
Attorney for Plaintiff.

[Endorsed]: Filed Mar. 10, 1936 R. S. Zimmerman, By M. R. Winchell, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

GARBUTT OIL COMPANY, a corporation,	)	
Plaintiff,	)	No. 5094-H
-v-	)	
	)	JUDGMENT
UNITED STATES OF AMERICA,	)	
Defendant.	)	

The above entitled cause came on regularly for trial on the 4th day of April, 1935, before the above-entitled Court, the Honorable Harry A. Hollzer, presiding, sitting without aid or intervention of a jury, a trial by jury having been waived by written stipulation of the parties hereto; Claude I. Parker, George H. Koster and Bayley Kohlmeier appearing as counsel for plaintiff, and Peirson M. Hall, United States Attorney for the Southern District of California, and Eugene Harpole, Special Attorney for the United States Bureau of Internal Revenue, appearing as counsel for the defendant, a partial stipulation of facts having been filed and both oral and documentary evidence having been introduced and the cause submitted for decision:

WHEREFORE, by reason of the law and the facts herein, IT IS ORDERED, ADJUDGED AND DECREED that the defendant do have and recover of the plaintiff his costs taxed in the sum of $16.00.

Dated March 10, 1936.

Hollzer

JUDGE OF THE UNITED STATES DISTRICT COURT

Approved as to form as provided by Rule 44:

Bayley Kohlmeier

Attorneys for Plaintiff.

Judgment entered and recorded MAR. 10 1936.

R. S. ZIMMERMAN, Clerk

By M. R. Winchell

Deputy Clerk.

[Endorsed]: Filed Mar. 10, 1936 R. S. Zimmerman, Clerk By M. R. Winchell, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

PETITION FOR APPEAL

TO THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION, AND TO HONORABLE HARRY A. HOLLZER, JUDGE THEREOF:

Your petitioner, the Garbutt Oil Company, the plaintiff in the above entitled cause, feeling aggrieved by the judgment rendered herein in favor of the defendant and entered on the tenth day of March, 1936, prays that an appeal may be allowed from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the Assignment of Errors which is filed herewith in order that the errors complained of may be corrected, and petitioner further prays that a citation be issued, as by law provided, commanding the defendant to appear before said Circuit Court of Appeals and that an order be made fixing the amount of the cost bond which plaintiff shall give and furnish upon said appeal and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to said Circuit Court of Appeals.

June 2, 1936.

Claude I. Parker
Claude I. Parker
Bayley Kohlmeier
Bayley Kohlmeier
Counsel for Plaintiff,
808 Bank of America Building,
Los Angeles, California.

[Endorsed]: Filed Jun. 2, 1936 R. S. Zimmerman, Clerk By Robert P. Simpson, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

GARBUTT OIL COMPANY, a corporation, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	No. 5094-H ASSIGNMENT OF ERRORS

Comes now the Garbutt Oil Company, plaintiff in the above entitled cause, and makes and files the following assignment of errors upon which it will rely in the prosecution of the appeal herewith petitioned for in said cause from the judgment of this Court entered on the 10th day of March, 1936.

I.

The Court erred in rendering and entering its decision and judgment in favor of defendant and against the plaintiff for the reason that said decision and judgment is contrary to the law and is not supported by the evidence or by the facts as found by the Court, or the facts as admitted by the pleadings and stipulated by the parties.

II.

The Court erred in denying plaintiff's motion for judgment for the reason that upon the evidence and upon the facts found by the Court, admitted by the pleadings and stipulated by the parties, the plaintiff is entitled to recover judgment as a matter of law.

III.

The Court erred in disallowing and refusing to adopt plaintiff's requested conclusion of law II-(1) for the reason that said conclusion of law is supported by the evidence and by the facts found by the Court, admitted by the pleadings and stipulated by the parties.

IV.

The Court erred in disallowing and refusing to adopt plaintiff's requested conclusion of law II-(2) for the reason that said conclusion of law is supported by the evidence and by the facts found by the Court, admitted by the pleadings and stipulated by the parties.

V.

The Court erred in disallowing and refusing to adopt plaintiff's requested conclusion of law II-(3) for the reason that said conclusion of law is supported by the evidence and by the facts found by the Court, admitted by the pleadings and stipulated by the parties.

VI.

The Court erred in disallowing and refusing to adopt plaintiff's requested conclusion of law II-(4) for the

reason that said conclusion of law is supported by the evidence and by the facts found by the Court, admitted by the pleadings and stipulated by the parties.

VII.

The Court erred in disallowing and refusing to adopt plaintiff's requested conclusion of law II-(6) for the reason that said conclusion of law is supported by the evidence and by the facts found by the Court, admitted by the pleadings and stipulated by the parties.

VIII.

The Court erred in disallowing and refusing to adopt plaintiff's requested conclusion of law II-(7) for the reason that said conclusion of law is supported by the evidence and by the facts found by the Court, admitted by the pleadings and stipulated by the parties.

IX.

The Court erred in making and adopting its conclusion of law numbered I for the reason that said conclusion of law is not supported by and is contrary to the facts as established by the evidence and the facts found by the Court, admitted by the pleadings and stipulated by the parties.

X.

The Court erred in making its conclusion of law numbered II for the reason that said conclusion of law is not

supported by and is contrary to the facts as established by the evidence and the facts found by the Court, admitted by the pleadings and stipulated by the parties.

XI.

The Court erred in making its conclusion of law numbered III for the reason that said conclusion of law is not supported by and is contrary to the facts as established by the evidence and the facts found by the Court, admitted by the pleadings and stipulated by the parties.

XII.

The Court erred in making its conclusion of law numbered V for the reason that said conclusion of law is not supported by and is contrary to the facts as established by the evidence and the facts found by the Court, admitted by the pleadings and stipulated by the parties.

XIII.

The Court erred as a matter of law in finding and concluding that the statement filed by plaintiff on May 31, 1929 did not constitute an amendment of its claim for refund of additional taxes paid for the calendar year 1919 filed on March 30, 1929.

XIV.

The Court erred as a matter of law in finding and concluding that the statement filed by plaintiff on May 31, 1929 amounted to an abandonment of the reasons advanced in the claim for refund filed March 30, 1929 for the allowance of the refund claimed therein.

XV.

The Court erred as a matter of law in failing and refusing to find that the statement filed by plaintiff on May 31, 1929 was a valid and timely amendment of its claim for refund filed on March 30, 1929 for the refund of taxes paid for the calendar year 1919.

XVI.

The Court erred in finding and concluding that plaintiff is barred by the limitation of Section 284(b) of the Revenue Act of 1926 from recovery in this action.

XVII.

The Court erred in failing and refusing to find that the claim for refund of taxes paid for the calendar year 1919, filed by plaintiff on March 30, 1929, as amended by the statement filed on May 31, 1929, constituted a proper, sufficient and timely claim for refund within the meaning of Section 284(b) of the Revenue Act of 1926.

XVIII.

The Court erred in failing and refusing to find that in considering plaintiff's claim for refund as amended by the statement filed on May 31, 1929 on its merits the Commissioner of Internal Revenue waived any defects or insufficiency in said claim for refund.

XIX.

The Court erred in failing and refusing to find that by treating said statement of May 31, 1929 as an amendment of plaintiff's original claim for refund for the year 1919,

filed on March 30, 1929, and by considering on their merits the contentions and grounds advanced in said statement of May 31, 1929, the Commissioner of Internal Revenue waived any objection which he might have had that said statement of May 31, 1929 was not timely presented.

XX.

The Court erred in failing and refusing to render and enter judgment in favor of plaintiff for the reason that upon the facts found by the Court and the facts admitted by the pleadings and stipulated by the parties, plaintiff is entitled to judgment as a matter of law.

XXI.

The Court erred in finding and concluding that the defendant is entitled to judgment against plaintiff for its costs.

WHEREFORE, plaintiff prays that said judgment may be reversed and for such other and further relief as to the Court may seem just and proper.

Claude I. Parker
Claude I. Parker
Bayley Kohlmeier
Bayley Kohlmeier
Counsel for Plaintiff.

DATED: This 2nd day of June, 1936.

[Endorsed]: Filed Jun. 2, 1936 R. S. Zimmerman, Clerk By Robert P. Simpson, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

ORDER ALLOWING APPEAL AND FIXING AMOUNT OF COST BOND.

The plaintiff in the above entitled cause, having filed herein and presented to the Court its Petition for Appeal, together with its Assignment of Errors, praying for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment rendered herein and entered on March 10, 1936, and praying further for an order fixing the amount of the cost bond and for an order for issue of citation and for transmittal of the record to the United States Circuit Court of Appeals for the Ninth Circuit;

IT IS ORDERED that the appeal as prayed for in said petition be and the same is hereby allowed for the review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision and judgment of the above entitled court referred to in said petition and that the amount of the cost bond to be given by said plaintiff and appellant upon appeal be and the same is hereby fixed at the sum of $250.00.

IT IS HEREBY FURTHER ORDERED that a duly authenticated transcript of the record, proceedings and papers in this cause be transmitted to the United States Circuit of Appeals for the Ninth Circuit.

DATED: This 2 day of June, 1936.

Hollzer
United States District Judge.

[Endorsed]: Filed Jun. 2, 1936. R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

STIPULATION FOR COSTS ON APPEAL

KNOW ALL MEN BY THESE PRESENTS, that Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto the UNITED STATES OF AMERICA, defendant in the above entitled case, in the penal sum of Two Hundred Fifty and No/100 ($250.00) Dollars, to be paid to said Defendant, its successors, assigns or legal representatives, for which payment well and truly to be made, the Fidelity and Deposit Company of Maryland binds itself, its successors and assigns firmly by these presents.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That Whereas, GARBUTT OIL COMPANY, a corporation, Plaintiff, is about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment made and entered on the 10th day of March, 1936, by the United States District Court for the Southern District of California, Southern Division, in the above entitled case.

NOW, THEREFORE, if the above named appellant shall prosecute said appeal to effect and answer all costs which may be adjudged against it if it fails to make good its appeal, then this obligation shall be void; otherwise to remain in full force and effect.

Signed, sealed and dated this 2nd day of June, 1936.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND

[Seal]

By W. H. Cantwell
Attorney in Fact

Attest D. M. Ladd
Agent.

STATE OF CALIFORNIA)
) ss:
County of Los Angeles)

On this 2nd day of June, 1936, before me S. M. Smith, a Notary Public, in and for the County and State aforesaid, duly commissioned and sworn, personally appeared W. H. Cantwell and D. M. Ladd known to me to be the persons whose names are subscribed to the foregoing instrument as the Attorney-in-Fact and Agent respectively of the Fidelity and Deposit Company of Maryland, and acknowledged to me that they subscribed the name of Fidelity and Deposit Company of Maryland thereto as Principal and their own names as Attorney-in-Fact and Agent, respectively.

[Seal] S. M. Smith
Notary Public in and for the State of California,
County of Los Angeles.

Examined and recommended for approval as provided in Rule 29.

Bayley Kohlmeier
Attorney

Approved this 3rd day of June, 1936.

Hollzer
District Judge.

[Endorsed]: Filed Jun 4-1936 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

AMENDED PRAECIPE

TO THE CLERK OF THE UNITED STATES DISTRICT COURT, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit on or before July 2, 1936, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following papers and documents:

1. All docket entries of proceedings before the Court, including all court orders.

2. Pleadings before the Court.

3. Waiver of Jury Trial.

4. Stipulation of Facts filed at the time of trial.

5. Memorandum of Conclusions, Judge Hollzer, December 31, 1935.

6. Findings of Fact and Conclusions of Law.

7. Judgment.

8. Petition for and Order Allowing Appeal and Fixing Amount of Bond.

9. Assignment of Errors.

10. Bond on Appeal.

11. This Amended Praecipe for Transcript of Record.

12. Citation on Appeal.

13. Admission of Service of Citation.

14. Clerk's Certificate.

DATED: This 19th day of June, 1936.

Claude I. Parker
Claude I. Parker
Bayley Kohlmeier
Bayley Kohlmeier
Counsel for Plaintiff,
808 Bank of America Building,
Los Angeles, California.

Service of the above Amended Praecipe and receipt of a copy thereof is hereby accepted and acknowledged, June 19, 1936.

Peirson M. Hall
U. S. Atty.
By Clyde Thomas
Asst U. S. Atty.
Counsel for Defendant.

[Endorsed]: Filed Jun. 23, 1936 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 82 pages, numbered from 1 to 82 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; all docket entries; complaint; answer to complaint; waiver of jury trial; stipulation of facts; memorandum of conclusions; special findings of fact and conclusions of law; judgment; petition for appeal; assignment of errors; order allowing appeal; stipulation for costs on appeal, and amended praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of July, in the year of Our Lord One Thousand Nine Hundred and Thirty-six and of our Independence the One Hundred and Sixty-first.

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 8281

Excerpt from Proceedings of Wednesday, March 31, 1937

Before WILBUR and MATHEWS, Circuit Judges, and NETERER, District Judge

Order of submission

ORDERED appeal in above cause argued by Mr. Bayley Kohlmeier, counsel for appellant, and by Mr. Harry Marselli, Special Assistant to the Attorney General, counsel for appellee, and submitted to the court for consideration and decision.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 8281

Excerpt from Proceedings of Wednesday, April 28, 1937

Before WILBUR and MATHEWS, Circuit Judges, and NETERER, District Judge

Order directing filing of opinion and filing and recording of judgment

By direction of the court, ORDERED that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 8281

GARBUTT OIL COMPANY (A CORPORATION), APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Opinion

April 28, 1937

Upon appeal from the District Court of the United States for the Southern District of California, Central Division.

Before WILBUR and MATHEWS, Circuit Judges, and NETERER, District Judge

NETERER, *District Judge:* This suit is to recover an over-payment of income taxes for the year ending 1919. The appellee pleaded the Statute of Limitations. Judgment was entered for the appellee March 10, 1936, and reversal is sought.

A trial by jury was waived and the court made findings of fact and conclusions, as required by statute, and found in substance that the appellant is a California corporation; that on October 3, 1907, it leased certain oil land and thereafter oil was discovered thereon and thereafter appellant's sole business was the production and distribution of oil from this property. On April 10, 1911, appellant's Board of Directors adopted a resolution to the effect that all oil produced by it after January 1, 1911, should be assigned to appellant's lessors to the extent of their royalty interest and to appellant's stockholders to the extent of their holdings of stock "pro rata in kind", so long as the stockholder should pay calls for money necessary to cover all expenses of appellant. All oil produced thereafter by the appellant from the date *supra* throughout the year 1919 was, pursuant to this arrangement, distributed in kind, respectively, to the lessors and the stockholders of appellant to the extent of their royalty and in proportion to their holdings of stock, respectively.

For the year 1919 appellant reported net income in the amount of $16,928.61 and a tax liability for the year of $2,072.68, which tax was, during 1920, paid. Thereafter the Commissioner of Internal Revenue for the proper District determined and assessed an additional tax of $3,105.65 against appellant for the year 1919. This tax appellant paid April 3, 1925.

On March 30, 1929, appellant filed with the Collector of Internal Revenue for the proper District its claim for refund on Form 843 of income and excess profits taxes over-paid for the year 1919 in the amount of $3,105.65. The refund was claimed on the grounds (1) that appellant was entitled to an additional deduction for amortization of the cost of a certain drilling contract, and (2) that its invested capital had been understated.

On May 31, 1929, before the March 30, 1929, refund application was determined, appellant filed a paper on oath with the Collector of Internal Revenue entitled, "Statement of Garbutt Oil Company * * * For the Purpose of Perfecting and Completing Claim for Refund Covering Alleged Over-payment of Income Tax for the Calendar Year 1919", and claimed refund for the following reasons:

"Reference is made to claim for refund in the amount of $3,105.65, filed by Garbutt Oil Company with principal place of business at Union Oil Building, Los Angeles, California, with the Collector for the Sixth District of California on or about March 29, 1929, covering over-payment of income tax alleged to have been made for the calendar year 1919. The claim was based upon the grounds that

"(a) The net income of the corporation was overstated to the extent of $12,500.00, because of the Commissioner's failure to allow a deduction for the amortization of the value of a certain contract entered into with the Union Oil Company of California, for which capital stock was issued having a par value of $250,000.00; and

"(b) That the invested capital as determined by the Commissioner was overstated by reason of the Commissioner's failure to include therein any portion of the cost to the Company of the above-mentioned contract entered into with the Union Oil Company of California.

"It now develops that a further reason exists in support of said claim for refund which is as follows:

"Commencing with the year 1911 the arrangement entered into between the Garbutt Oil Company and the Union Oil Company of California, which owned 50% of said stock, was to the effect that the stockholders were to pay in to the company a sufficient amount to cover the operating expenses and they were to receive the oil produced by the company and sell it themselves. Under this arrangement the company received none of the proceeds derived from the sale of the oil, although it appears for bookkeeping purposes the oil was considered distributed to the stockholders at its market value when distributed and the difference between the expense of operation and the market value of the oil when distributed was accounted for as income to the Government.

"As a matter of fact, the Garbutt Oil Company distributed assets in kind to its stockholders and they were entitled to treat the property so received as a dividend, which under the income tax law and regulations they should have accounted for at the market value of the property, in this case consisting of crude oil at its market value when received.

"In this connection attention is called to statement appearing in recent letter from the Commissioner's office addressed to the Union Oil Company of California, setting forth the final adjustments made in its income and profits tax liability for the year 1918 and subsequent years. The particular statement in the Commissioner's letter to which attention is directed appears under Schedule 1–A, and is as follows:

"'The Union Oil Company owning 50% of the stock of the Garbutt Oil Company received from it each year one-half of the oil produced and paid one-half of its expenses. As the Garbutt Oil Company is a domestic corporation subject to tax on its net income the value of the oil received by the Union Oil Company in excess of expenses paid is here treated as a dividend received.'

"In addition to the foregoing, it is further submitted that the Internal Revenue Bureau heretofore consistently had recognized the fact that under the Revenue Acts in force prior to the Revenue Act of 1928, a corporation realizes neither profit nor loss in the distribution of its assets to its stockholders.

"By eliminating the fictitious gross profits or appreciation taken up on the return of the Garbutt Oil Company for the year 1919, arising from the distribution of the oil produced in the manner hereinbefore explained, no taxable profit results, and it therefore follows that even though the specific grounds set forth in the claim for refund are denied said claim should, nevertheless, be allowed in full for the reasons herein set forth.

"It is therefore respectfully urged that the amount by which the Garbutt Oil Company has overpaid its correct tax liability for the year 1919, viz, $5,178.33, or so much thereof as is properly refundable within the statute of limitations, be refunded together with interest computed thereon as provided by existing law."

The trial court found that plaintiff (appellant) predicates its right to recover in this action upon the reasons set forth for the first time in the statement filed May 31, 1929, and also found that the Commissioner of Internal Revenue undertook to treat this supplemental statement as an amendment to the original claim and to consider it on its merits and wrote to the appellant August 12, 1919, that the claim could not be allowed, as follows:

"You further contend that inasmuch as the taxpayer entered into an agreement with its stockholders in 1911 for said stockholders to pay into the company sufficient funds to pay the expenses and the company was to turn over to the stockholders all the oil produced for them to sell, that the Garbutt Oil Company distributed to its stockholders assets in kind and that no taxable profit accrued to the taxpayer.

"This office holds that the distribution of oil in excess of the expenses contributed represents a distribution of profits which are taxable to the corporation."

The trial court also found that the claim of May 31, 1929, was not an amendment of its claim filed March 30, 1929, but constituted an abandonment of the said claim and the substitution of an entirely new claim; that plaintiff (appellant) was barred subsequent to April 3, 1929, from filing a claim for refund for taxes paid April 3, 1925, for the year 1919 (Section 284 (b) of the Revenue Act of 1926); and having abandoned its claim for refund filed March 30, 1929, could not thereafter file an entirely new claim. It was admitted at bar that the claim filed March 30, 1929, was abandoned at the trial of the case.

We think the trial court erred in holding that the claim filed on the 31st day of May 1929 was a new claim and not an amendment to the claim filed on March 30, 1929. The amendment filed is germane to the original claim and asks for a refund of $5,178.33, whereas the first claim claimed a refund in the sum of $3,105.65. Both of these claims grew out of substantially the same facts and the claim had not been determined, the matter had not been adjudicated, and the same rules applied as in ordinary law actions. The fact that the first claim was abandoned at trial does not establish the fact it did not have sufficient vitality at the time the amendment was filed

to support the same. The same question is presented in this case as was answered by the Supreme Court, through Justice Cardozo, in *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62–64:[1]

"May a claim for a tax refund which has been seasonably filed, but which fails to state the grounds upon which the refund is demanded, be amended by specifying the grounds at any time before the claim in its original form has been finally rejected, though it be after the time when a wholly new claim would be barred by limitation?"

On page 67, *supra:*

"Indefinite and general it was, and hence, until amended or supplemented, an inadequate compliance with the Treasury requirement that the facts relied upon in support of a claim are to be stated under oath. Beyond doubt it might have been rejected as irregular while its form was uncorrected. This is far from saying that there was the presentation of a new claim and not the perfecting of an old one when the gaps were filled thereafter."

In the instant case the application for refund was made in the proper form, but it stated a different ground for refund. Both grounds could have been consistently stated in the original claim. Undoubtedly the first claim could have been denied and if so before the limitation had run it would not have supported the amendment.

We think the judgment should be and is reversed.

(Endorsed:) Opinion. Filed Apr. 28, 1937. Paul P. O'Brien, *Clerk.*

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 8281

GARBUTT OIL COMPANY, A CORPORATION, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE.

Judgment

Upon appeal from the District Court of the United States for the Southern District of California, Central Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of California, Central Division, and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is, reversed.

---

[1] Compare *Bowers* v. *New York Trust Co.*, 9 F. (2d) 548 (C. C. A. 2); *Reid* v. *Rafferty*, 15 F. (2d) 264 (C. C. A. 2); *United States* v. *Factors & Finance Co.*, 288 U. S. 89; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373; *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73; *Bemis Bro. Bag Co.* v. *United States*, 289 U. S. 28.

(Endorsed:) Judgment. Filed and entered April 28, 1937. Paul P. O'Brien, *Clerk*.

Certificate of clerk, U. S. Circuit Court of Appeals for the Ninth Circuit, to record certified under Rule 38 of the Revised Rules of the Supreme Court of the United States

I, PAUL P. O'BRIEN, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing ninety-three (93) pages, numbered from and including 1 to and including 93, to be a full, true, and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of Hon. J. Stanley Reed, Solicitor General of the United States, counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 17th day of July A. D. 1937.

[SEAL] (Sgd.) PAUL P. O'BRIEN, *Clerk*.

U. S. GOVERNMENT PRINTING OFFICE: 1937

Order allowing certiorari

Filed October 11, 1937.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, and the case is assigned for hearing immediately following No. 48.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice BLACK took no part in the consideration and decision of this application.

U. S. GOVERNMENT PRINTING OFFICE: 1937

BLANK

PAGE

BLANK

PAGE

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute and regulation involved	2
Statement	2
Specification of errors to be urged	5
Reasons for granting the writ	6
Conclusion	13
Appendix	14

CITATIONS

Cases:	
Andrews v. *United States*, 17 F. Supp. 980, No. 48, Oct. Term, 1937	7, 8, 13
B. & O. S. W. R. Co. v. *Carroll*, 280 U. S. 491	12
Bryant Paper Co. v. *Holden*, 63 F. (2d) 370, certiorari denied, 290 U. S. 631	6
Con. P. Curran Printing Co. v. *United States*, 15 F. Supp. 153, certiorari denied, April 26, 1937	13
New York Trust Co. v. *United States*, 87 F. (2d) 889, certiorari denied, June 1, 1937	6–7
United States v. *Henry Prentiss & Co.*, 288 U. S. 73	7
United States v. *Memphis Cotton Oil Co.*, 288 U. S. 62	7, 9
United States v. *Richards*, 79 F. (2d) 797, certiorari denied, 297 U. S. 718	6
United States v. *Seminole Nation*, 299 U. S. 417	12
Youngstown Sheet & Tube Co. v. *United States*, 7 F. Supp. 290, certiorari denied, 293 U. S. 599	13
Statutes:	
Revenue Act of 1926, c. 27, 44 Stat. 9:	
Sec. 284	10, 14
Sec. 1113 (U. S. C., title 26, sec. 1672)	15
Miscellaneous:	
Regulations 77, Art. 1254	9
Regulations 86, Art. 322–3	9
Regulations 94, Art. 322–3	9
Mim. 4092, Cum. Bul. XII–2, pp. 96, 97	9
Treasury Decision 4265, VIII–1 Cumulative Bulletin 110	10, 16

5284—37——1

BLANK

PAGE

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 262

UNITED STATES OF AMERICA, PETITIONER

v.

GARBUTT OIL COMPANY, A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Ninth Circuit, entered in the above entitled cause on April 28, 1937.

OPINION BELOW

The memorandum of conclusions handed down by the District Court (R. 51–52) is unreported. The opinion of the Circuit Court of Appeals (R. 85) is reported at 89 F. (2d) 749.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 28, 1937 (R. 89). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

After filing a timely claim for refund on certain specific grounds, the respondent, after the statutory period of limitation had expired, filed, as a purported amendment, another claim for refund on an entirely different and new ground. Was the respondent entitled to recover on the new ground?

STATUTE AND REGULATION INVOLVED

The statute and regulation involved herein will be found in the Appendix, *infra,* pp. 14–16.

STATEMENT

This is an action to recover an alleged overpayment of income taxes for the year 1919, tried to the court without a jury, jury trial having been waived (R. 46). The facts, as stipulated (R. 47–50) and as found by the trial court (R. 53–67), may be summarized as follows:

The respondent, a California corporation, on October 3, 1907, leased certain oil land and, after the discovery of oil, was engaged in the production and distribution of oil therefrom. On April 10, 1911, its board of directors adopted a resolution to the effect that all oil produced after January 1, 1911, should be assigned to the respondent's lessors to the extent of their royalty interest, and to the respondent's stockholders to the extent of their holdings of stock, pro rata, in kind, so long as the stockholders should pay calls for money necessary

to cover the expenses of respondent. Thereafter, all oil produced was distributed to the lessors and the stockholders, in accordance with their respective interests. On its books and income tax returns the plaintiff corporation adopted a system of recording the oil produced at its market value and treated the difference between that value and the cost of producing the oil as income. The Commissioner of Internal Revenue likewise adopted this method and treated the income so computed as taxable income. (R. 49, 66–67.)

For the year 1919, respondent filed an income and excess profits tax return disclosing a net income of $16,928.61, and a tax liability of $2,072.68, which was paid during 1920. Upon audit thereof, the Commissioner of Internal Revenue determined and assessed an additional tax of $3,105.65 for the year 1919, which additional tax was paid by respondent on April 3, 1925. (R. 53–55.)

On March 30, 1929, respondent filed a claim for refund of income and excess profits taxes alleged to have been overpaid for the year 1919, in the amount of $3,105.65, based upon two specific grounds: (1) that it was entitled to an additional deduction for the amortization of the cost of a certain drilling contract, and (2) that, for the purposes of profits tax, its invested capital had been understated by reason of the failure to include the unrecovered value of the drilling contract (R. 54–62).

While this claim was pending before the Commissioner, the respondent, on May 31, 1929, filed a document entitled "Statement of Garbutt Oil Company, Los Angeles, California, for the Purpose of Perfecting and Completing Claim for Refund Covering Alleged Overpayment of Income Tax for the Calendar Year 1919", wherein it asserted as "a further reason" in support of its claim that, because of the distribution of its oil, in kind, it had realized no taxable income during the year 1919, and whereby it sought the refund of $5,178.33. (R. 62-65.)

Thereafter, the Commissioner, in his letter of August 12, 1929 (R. 37–38), notified the respondent that its claim for refund of $3,105.65 would be rejected, giving his reasons for the rejection of the grounds urged in the respondent's original claim; and also, to the extent recited in that letter, the Commissioner undertook to consider on its merits the supplemental statement filed on May 31, 1929, saying with respect to the new ground for refund urged in the supplemental statement: "This office holds that the distribution of oil in excess of the expenses contributed represents a distribution of profits which are taxable to the corporation." (R. 66.)

On November 13, 1929, the Commissioner sent another letter to the respondent (R. 39–41), notifying it that the claim for refund would be rejected, and stating that its second claim was rejected on

the ground that it was an entirely new claim filed after the expiration of the period of limitation for the filing of claims. Formal rejection followed on November 21, 1929 (R. 48–49).

The respondent sued in the District Court for the recovery of $3,105.65, upon both the grounds stated in its original claim of March 30, 1929, and those asserted in its second claim of May 31, 1929 (R. 7–42). At the trial, the first claim was abandoned and recovery was sought upon the grounds set forth in the second claim (R. 65, 88). The District Court held that the statement of May 31, 1929, did not constitute an amendment of the claim filed March 30, 1929, and that the respondent was barred from recovery because the claim relied upon (the statement of May 31, 1929) had been asserted for the first time after the expiration of the period of limitation provided by Section 284 (b) of the Revenue Act of 1926 for the filing of claims for refund. (R. 51–52, 67–68.) Judgment was entered in favor of the United States (R. 69–70).

The Circuit Court of Appeals, reversing the District Court, stated that the trial court had erred in holding that the statement of May 31st was not an amendment to the claim filed on March 30th, and held that the amendment filed was germane to the original claim.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that, under the facts of this case, the respondent was entitled to recover on the new

claim, filed after the period of limitation had expired, but purporting to be an amendment to the timely claim for refund.

2. In failing to hold that, under the facts of this case, refund on the new claim, filed after expiration of the period of limitation, was barred by the statute of limitations, and that the claim so filed did not constitute an amendment to the timely claim, as it stated a new and different ground for refund or cause of action.

3. In holding that the purported amendment was germane to the original claim for refund.

4. In failing to affirm the judgment rendered by the District Court in favor of the United States.

REASONS FOR GRANTING THE WRIT

1. In holding that a claim for refund seeking the repayment of taxes in a stated amount on specific grounds may be amended, after the statute had run on the filing of a new claim, to permit recovery on a ground entirely unrelated to those asserted in the original claim, the court below has rendered a decision which conflicts with the decisions of the Circuit Court of Appeals for the Sixth Circuit in *United States* v. *Richards,* 79 F. (2d) 797, certiorari denied, 297 U. S. 718, and *Bryant Paper Co.* v. *Holden,* 63 F. (2d) 370, certiorari denied, 290 U. S. 631, and the holding of the Second Circuit in *New York Trust Co.* v. *United*

States, 87 F. (2d) 889, certiorari denied, June 1, 1937.[1] The decision below also conflicts in principle with the decision of this Court in *United States* v. *Henry Prentiss & Co.,* 288 U. S. 73.

The view of the court below that the question presented in the instant case was answered by this Court in *United States* v. *Memphis Cotton Oil Co.,* 288 U. S. 62, 64, constitutes a misconstruction and a misapplication of that case. The original claim in that case was indefinite and general, and failed to state any grounds upon which the refund was demanded. Here the original claim set forth definite, specific grounds supported by particulars.

2. The consideration of a similar question has been requested by the Government's petition for certiorari in the case of *Andrews* v. *United States,* 17 F. Supp. 980 (C. Cls.), October Term, 1937, No. 48. In that case, as in the instant case, two claims for refund were filed, one before and one after the

[1] On June 22, 1937, a petition for rehearing was filed by the taxpayer in *New York Trust Co.* v. *United States,* No. 921, October Term, 1936. That case was decided by the Circuit Court of Appeals on alternative grounds. The first ground presents a question of amendment of specific claims for refund, and the second ground the question whether the original claim had been finally acted upon prior to the filing of the alleged amendment. In its brief in opposition in that case, while the Government asserted that the judgment of the Circuit Court should, in any event, ultimately be sustained on the second ground, the Government did not, in view of the importance of the first question and the probable conflict of decisions, oppose a review of the first question in that case if deemed essential to the decision therein.

bar of the statute of limitations, and the second claim, while purporting to amend the still pending first claim, introduced a new ground. The first claim sought the allowance of deductions from gross income upon the ground that stocks held by the taxpayer in two corporations had become worthless. The second claim, which was for a larger amount, introduced the new ground that an item of gross income resulting from a transaction with a third corporation should have been treated as a gain on the sale of stock and not as a dividend. The first claim was disposed of to the satisfaction of the taxpayer, and the second claim was disallowed on the ground that it was barred by the statute of limitations. The Court of Claims allowed a recovery on the second claim. The Government's petition for certiorari in that case states that the holding of the Court of Claims, that a claim for refund on specific grounds may be amended after the expiration of the period of limitation to permit recovery upon an entirely different and unrelated ground, is in conflict with the same cases with which the decision below in the instant case is asserted to be in conflict.

3. The question presented by the instant case is one of importance in the administration of the Federal revenue laws and is of interest to taxpayers generally. This reason is also urged in the petition for certiorari in *United States* v. *Andrews, supra.* Since March 27, 1929, the regulations of

the Treasury Department, applicable to claims for refund filed on or after May 1, 1929 (the original claim in the present case was filed March 30, 1929, and the second claim May 31, 1929), have consistently provided that claims for refund must set forth in detail and under oath each ground upon which a refund is claimed and that no refund will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor, except upon one or more of the grounds set forth in a claim, or an amendment thereof, *filed prior* to the expiration of such period.[2] The decisions of this Court which have dealt with the question of amendment of claims for refund, such as *United States* v. *Memphis Cotton Oil Co., supra,* involved claims filed under earlier and different regulations.[3] Taxpayers, although precluded under present regulations, are continuing to litigate their right to amendment of a timely claim after the expiration of the statutory period

---

[2] Treasury Decision 4265, VIII–1 Cumulative Bulletin 110 (Appendix, *infra*, p. 16). Beginning with the regulations under the Revenue Act of 1932, the words "or an amendment thereof" have been eliminated, but the deletion has resulted in no change because even under the language of Treasury Decision 4265 the amendment must have been filed prior to the expiration of the period of limitation. Article 1254, Regulations 77, Revenue Act of 1932; Articles 322–3, Regulations 86, Revenue Act of 1934; Articles 322–3, Regulations 94, Revenue Act of 1936.

[3] Mim. 4092 of October 30, 1933, Cumulative Bulletin XII–2, pages 96, 97.

of limitation, and, as the question arises frequently, we feel that this Court should settle whatever doubts may exist as to the validity of the existing regulations. However, even under this Court's decisions, and without regard to the change in the regulations, we believe, as urged in the *Andrews* petition, that there was no right of amendment.

4. The original claim for refund in the present case, filed March 30, 1929, claimed an overpayment of taxes for the year 1919 in the amount of $3,105.65, and specified as the grounds for the refund that the respondent was entitled to an additional deduction for amortization of the cost of a certain drilling contract, and that the respondent was entitled to an addition to invested capital, for the purposes of profits tax, for the unamortized cost of the drilling contract. The tax sought to be refunded had been paid April 3, 1925, and the period for filing a claim for refund thereof expired on April 3, 1929. Section 284 (b) of the Revenue Act of 1926, *infra*. The purported amendment to the original claim was filed May 31, 1929, which was subsequent to both April 3, 1929, and May 1, 1929, the latter being the effective date of the new regulations (Treasury Decision 4265, *infra*). This second claim, allegedly "for the Purpose of Perfecting and Completing" the original claim, asked for a refund of $5,178.33, upon the ground that the respondent realized no taxable income from the distribution of oil, in kind, to its stockholders.

The original claim did not charge overpayment generally, but asked for a refund of a stated sum and specified particular facts and reasons why that sum of money should be refunded. The case, therefore, is not one where the claimant has left the grounds of challenge open, and where the Bureau of Internal Revenue has itself to blame for not insisting at the outset upon a full disclosure of the grievance. The grievance was specifically stated, and the Commissioner was called upon to explore the narrow and designated territory of whether the respondent was entitled to a deduction for the amortization of the cost of the drilling contract, and of whether it was entitled to add to its invested capital the unrecovered value of that drilling contract. In its income tax returns, and in its original claim for refund, the respondent had treated the difference between the production cost and market value of its oil as taxable income. (R. 22–32, 49.) In this treatment the Commissioner had acquiesced (R. 49).

The second claim for refund, filed May 31, 1929, asserted, for the first time, the new ground that the respondent derived no taxable income in 1919 because of the distribution of its oil, in kind, to its stockholders. It being then too late to file a new claim for refund, the respondent sought to assert the new claim by way of amendment to the old claim, or, as the respondent labeled it, "for the Purpose of Perfecting and Completing" the origi-

nal claim. The new claim, which was for a larger amount, set up an entirely different and unrelated ground for the recovery of taxes. While the old claim dealt exclusively with the facts surrounding the drilling contract, seeking a deduction and an addition to invested capital by reason thereof, the new claim presented the contention that the respondent realized no taxable income at all during the taxable year. It is apparent that the paths of investigation to be followed in considering the original claim would at no time cross the paths to be followed under the new claim. The consideration of a claim for a deduction and for an addition to invested capital on account of a drilling contract would not lead to a consideration of what was income to the respondent. The new claim sought relief on a wholly different grievance, on an entirely unrelated theory and on unrelated facts.

If, as this Court and lower Federal courts have held, in determining what is a permissible amendment of a claim for refund, weight must be given to analogies of pleading in a lawsuit, the conclusion must follow in the present case that the claim of May 31, 1929, did not constitute merely a perfection of a defectively stated cause of action, or the adaptation of a prayer for relief to facts adequately alleged, but was the introduction of an entirely new cause of action. Cf. *United States* v. *Seminole Nation,* 299 U. S. 417; *B. & O. S. W. R. Co.* v. *Carroll,* 280 U. S. 491.

5. An added factor is present in the instant case, in addition to the facts which are common to this case and to *Andrews* v. *United States, supra.* In the instant case, the Commissioner did, in his letter of August 12, 1929, purport to consider the second claim on its merits, to the extent of stating that his office held to the contrary. But there was at no time a consideration calling for a reaudit of the entire case. Cf. *Con. P. Curran Printing Co.* v. *United States,* 15 F. Supp. 153 (C. Cls.), certiorari denied, April 26, 1937; and *Youngstown Sheet & Tube Co.* v. *United States,* 7 F. Supp. 290 (C. Cls.), certiorari denied, 293 U. S. 599. However, the court below, in arriving at its conclusion, did not rely upon the fact that the Commissioner purported to consider the second claim on its merits, to the extent recited in his first letter of rejection, dated August 12, 1929. The decision of the court below rests solely upon the holding that the purported amendment was germane to the original claim for refund, and allowable as such.

CONCLUSION

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Ninth Circuit should be granted.

STANLEY REED,
Solicitor General.

JULY 1937.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively,

immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

* * * * *

SEC. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

* * * * *

(U. S. C., Title 26, Sec. 1672.)

Treasury Decision 4265, VIII–1 Cumulative Bulletin 110 (amending Art. 1254 of Regulations 74, promulgated under the Revenue Act of 1928):

(1) A claim for refund or credit of any internal revenue tax, or for refund of interest or penalties, erroneously or illegally collected should be made on the form prescribed by the Treasury Department (Form 843), and should be filed with the collector of internal revenue, although a claim will not be considered defective solely by reason of the fact that it is not made on the form or that it is filed with the Commissioner of Internal Revenue. The claim must set forth in detail and under oath each ground upon which a refund or credit is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. Any claim which does not comply with the requirements of the preceding sentence will not be considered for any purpose as a claim for refund or credit.

(2) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds so set forth in a claim, or an amendment thereof, filed prior to the expiration of such period.

(3) These regulations shall take effect on May 1, 1929, and shall be applicable to all claims filed on or after such date, and all other regulations are modified in so far as they are inconsistent with these regulations.

U. S. GOVERNMENT PRINTING OFFICE: 1937

BLANK

PAGE

BLANK

PAGE

BLANK

PAGE

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute and other authorities involved	2
Statement	2
Specification of errors to be urged	6
Summary of argument	7
Argument:	
I. The second refund claim was a wholly new claim and was barred by the statute of limitations	8
II. The Commissioner did not waive and had no power to waive the statutory requirement for a timely refund claim	13
Conclusion	25
Appendix	27

CITATIONS

Cases:	
Bemis Bro. Bag Co. v. *United States*, 289 U. S. 28	11
Bryant Paper Co. v. *Holden*, 63 F. (2d) 370, certiorari denied, 290 U. S. 631	9, 13, 21
Champion Spark Plug Co. v. *Automobile Sundries Co.*, 273 Fed. 74	15, 16
Cheatham v. *United States*, 92 U. S. 85	19
Compagnie Generale Transatlantique v. *United States*, 51 F. (2d) 1053	18
Cordova v. *Hood*, 17 Wall. 1	15
Daube v. *United States*, 289 U. S. 367	21
Finn v. *United States*, 123 U. S. 227	18
Florsheim Bros. Co. v. *United States*, 280 U. S. 453	15
G. Amsinck & Co. v. *Springfield Grocery Co.*, 7 F. (2d) 855	16
Globe Mutual Insurance Co. v. *Wolff*, 95 U. S. 326	16
Moore Ice Cream Co. v. *Rose*, 289 U. S. 373	11
New York Trust Co. v. *United States*, 87 F. (2d) 889, certiorari denied, June 1, 1937	9, 13
Nichols v. *United States*, 7 Wall. 122	19
Reynolds v. *McMurray*, 77 F. (2d) 740	13
Rock Island, etc., R. R. Co. v. *United States*, 254 U. S. 141	19
Stange v. *United States*, 282 U. S. 270	15
Swedish Iron & Steel Corp. v. *Edwards*, 1 F. Supp. 335, affirmed, 69 F. (2d) 1018	9

Cases—Continued. Page.
Tucker v. *Alexander*, 275 U. S. 228 ..... 13, 22, 23
United States v. *Chicago Golf Club*, 84 F. (2d) 914 19
United States v. *Factors & Finance Co.*, 288 U. S. 89 11
United States v. *Felt & Tarrant Co.*, 283 U. S. 269 ..... 17, 18
United States v. *Henry Prentiss & Co.*, 288 U. S. 73 ..... 9, 12, 13
United States v. *Humble Oil & Refining Co.*, 69 F. (2d) 214 .. 13
United States v. *Mable S. Andrews, Executrix of the Estate of Matthew Andrews, Deceased*, No. 48, Oct. Term, 1937 .. 1, 9
United States v. *Memphis Cotton Oil Co.*, 288 U. S. 62 ..... 9, 11, 12, 13, 18, 22
United States v. *Michel*, 282 U. S. 656 19
United States v. *Richards*, 79 F. (2d) 797, certiorari denied, 297 U. S. 718 ..... 9, 13, 21
United States v. *Seminole Nation*, 299 U. S. 417 12
United States Paper Exports Ass'n v. *Bowers*, 6 F. Supp. 735 .. 13
Victor Products Corp. v. *Yates-American Mach. Co.*, 54 F. (2d) 1062 16
Weihman v. *United States*, 4 F. Supp. 155 13

Statutes:
Revenue Act of 1926, c. 27, 44 Stat. 9:
Sec. 278 20
Sec. 284 ..... 8, 19, 27
Sec. 1113 (U. S. C., Title 26, Sec. 1672) 17, 28
Revenue Act of 1928, c. 852, 45 Stat. 791:
Sec. 608 20
Sec. 610 20

Miscellaneous:
Treasury Decision 4265, VIII–1 Cumulative Bulletin 110 .. 17, 30

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 262

UNITED STATES OF AMERICA, PETITIONER

v.

GARBUTT OIL COMPANY, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The memorandum of conclusions by the District Court (R. 51–52) is unreported. The opinion of the Circuit Court of Appeals (R. 85) is reported at 89 F. (2d) 749.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 28, 1937. (R. 89–90.) The petition for a writ of certiorari was filed July 28, 1937, and was granted October 11, 1937 and the case was assigned for hearing immediately following No. 48, *United States* v. *Mable S. Andrews, Executrix of*

the Estate of Matthew Andrews, Deceased (R. 91). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a timely refund claim on a specific ground may be amended, after the period of limitation has expired, by a second claim on a different and unrelated specific ground.

2. Whether the Commissioner waived, or had the power to waive, the statutory requirement for a timely refund claim.

STATUTES AND TREASURY REGULATIONS INVOLVED

The statutes and treasury regulations involved will be found in the Appendix, *infra*, p. 27.

STATEMENT

This is an action brought by the respondent in the District Court of the United States for the Southern District of California, Central Division, to recover an alleged overpayment of income taxes for 1919, tried without a jury (R. 46). The facts, as stipulated (R. 47–50) and as found by the trial court (R. 53–67), may be summarized as follows:

The respondent, a California corporation, acquired a lease of certain oil property on October 3, 1907 (R. 49, 66). On April 10, 1911, its board of directors adopted a resolution to the effect that all oil produced after January 1, 1911, should be assigned to the respondent's lessors to the extent of

their royalty interest, and to the respondent's stockholders to the extent of their holdings of stock, pro rata, in kind, so long as the stockholders should pay calls for money necessary to cover the expenses of the respondent. Thereafter, the resolution remained in effect at all times to and including the year 1919, and all oil produced was distributed in kind to the lessors and the stockholders. (R. 49, 66–67.)

On its books and income tax returns the respondent adopted a system of recording the oil produced at its market value and treated the difference between that value and the cost of producing the oil as income. The Commissioner of Internal Revenue likewise adopted this method and treated the income so computed as taxable income. (R. 49.)

For 1919, the respondent filed an income and excess profits tax return disclosing a net income of $16,928.61, and a tax liability of $2,072.68, which was paid during 1920 (R. 53, 55). Upon audit of the return the Commissioner of Internal Revenue determined and assessed an additional tax of $3,105.65 for 1919, which the respondent paid on April 3, 1925 (R. 54).

On March 30, 1929, the respondent filed a claim for refund of the entire sum of $3,105.65 which had been paid within the four year period of limitations for filing claims based upon two specific grounds: (1) that it was entitled to an additional deduction of $12,500.00 for the amortization of the cost of a drilling contract of the respondent with Union Oil

Company of California in which the latter agreed to provide expenses of developing the leased oil property and to be reimbursed only out of any oil produced as consideration for capital stock of the respondent of the par value of $250,000.00 and (2) that, for the purposes of the excess profits tax, its invested capital had been understated by the failure to include the unrecovered cost of that drilling contract in the sum of $109,375.00 (R. 54–62, 63).

While this refund claim was pending before the Commissioner, but after expiration of the four year period of limitation on April 3, 1929, the respondent, on May 31, 1929, filed a "Statement of Garbutt Oil Company, Los Angeles, California, for the Purpose of Perfecting and Completing Claim for Refund Covering Alleged Overpayment of Income Tax for the Calendar Year 1919" (R. 62). In that statement, hereinafter sometimes called the second refund claim, respondent asserted that it "now develops that a further reason exists in support of" the pending claim, because by the distribution of oil in kind the respondent realized no taxable income during 1919, and that "it therefore follows that even though the specific grounds set forth in the claim for refund are denied said claim should, nevertheless, be allowed in full" for the reasons set forth in the statement. The statement seeks the refund of the entire tax paid for 1919 in the sum of $5,178.33 or so much thereof as is refundable within the statute of limitations. (R. 62–65.)

A letter dated August 12, 1929, from the Commissioner to the respondent (R. 37–38) stated that its claim for refund of $3,105.65 would be rejected on the ground that inasmuch as the Union Oil Company was to be reimbursed out of oil receipts a double deduction for development cost could not be allowed by also amortizing the amount of $250,000.00 as cost of the contract. The letter then referred to the contention in the statement filed on May 31, 1929, and stated: "This office holds that the distribution of the oil in excess of the expenses contributed represents a distribution of profits which are taxable to the corporation." (R. 38, 66). This letter then stated that a hearing could be had on the proposed rejection of the claim if requested in writing.

On October 4, 1929, a conference was held on the claim (R. 39). It does not appear whether or not the merits of the late claim were discussed.

On November 13, 1929, the Commissioner sent another letter to the respondent (R. 39–41), stating that the claim for refund of $3,105.65 would be rejected because the drilling contract was a liability rather than an asset and stating that the new contention was rejected on the ground that it was not referred to in the timely claim and was filed not only after the expiration of the period of limitation on April 3, 1929, but also after expiration of the time to perfect informal claims, after expiration of the period of limitations, by filing a formal claim on or before May 1, 1929, pursuant to Treasury De-

cision 4266, Cum. Bull. VIII–1, p. 111. Formal rejection of the claim for $3,105.65 followed on November 21, 1929 (R. 42, 48–49).

The respondent sued in the District Court for the Southern District of California for the recovery of $3,105.65, upon the grounds stated in its claim of March 30, 1929, and upon the ground asserted in the statement filed of May 31, 1929 (R. 12–15). At the trial the grounds of the refund claim filed March 30, 1929 were abandoned and recovery was sought upon the ground set forth in the statement filed on May 31, 1929 (R. 65, 88). The trial court held that the statement filed May 31, 1929 did not constitute an amendment of the claim filed March 30, 1929 and was filed too late (R. 51–52, 67–68). The trial court found that the Commissioner, to the extent indicated in his letter of August 12, 1929, considered the late contention on the merits (R. 66). Judgment was entered in favor of the United States (R. 69–70).

The Circuit Court of Appeals, reversing the District Court, held that the statement filed May 31, 1929 was an amendment germane to the refund claim filed March 30, 1929 and that both claims grew out of substantially the same facts (R. 88).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that, under the facts of this case, the respondent was entitled to recover on the new claim, filed after the period of limitation had ex-

pired, but purporting to be an amendment to the timely claim for refund.

2. In failing to hold that, under the facts of this case, refund on the new claim, filed after expiration of the period of limitation, was barred by the statute of limitations, and that the claim so filed did not constitute an amendment to the timely claim, as it stated a new and different ground for refund or cause of action.

3. In holding that the purported amendment was germane to the original claim for refund.

4. In failing to affirm the judgment rendered by the District Court in favor of the United States.

SUMMARY OF ARGUMENT

The timely claim for refund assumed the existance of realized income and sought recovery solely on the two specific and definite grounds that $12,500.00 should be deducted from gross income as amortization of the cost of the contract with Union Oil Company and that $109,375.00 should be added to invested capital as the unreturned cost of that contract. The untimely statement "for the Purpose of Perfecting and Completing" the timely claim asserted a "further reason" for refund which presented the wholly different and unrelated ground for refund that there was no realized income and which was then barred by the statute of limitations as construed by the applicable decisions and treasury regulations.

28251—37——2

The Commissioner, by considering and discussing the merits of the late claim, after the period of limitation had expired, to the extent stated in the letter of August 12, 1929, to the respondent did not in fact waive, and had no power to waive, the statutory requirement of a timely refund claim.

ARGUMENT

I

THE SECOND REFUND CLAIM WAS A WHOLLY NEW CLAIM AND WAS BARRED BY THE STATUTE OF LIMITATIONS

The Revenue Act of 1926, Sec. 284 (b) (1) (Appendix, *infra,* p. 27), provides that no refund of an overpayment of any income tax imposed by any prior Revenue Act shall be made unless a claim is filed within four years of payment of the tax. The additional assessment of $3,105.65 for 1919, imposed under the Revenue Act of 1918, was paid on April 3, 1925. Within four years, and on March 30, 1929, the timely refund claim, relying solely on the two specific grounds relating to the cost of the drilling contract with Union Oil Company, was filed. After expiration of the four year period, and on May 31, 1929, the statement "for the Purpose of Perfecting and Completing" the timely claim, and relying on the wholly different specific ground relating to distribution of the respondent's oil in kind to lessors and stockholders, was filed

and was disallowed by the Commissioner solely because it was too late (R. 41).

Reversing the District Court, the Circuit Court of Appeals held that the late statement of a new and different ground was an amendment germane to the timely claim and growing out of substantially the same facts and for this determination relied upon *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62.

The Government contends that this case is governed by the rule announced in *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73; *New York Trust Co.* v. *United States*, 87 F. (2d) 889 (C. C. A. 2d), certiorari denied, June 1, 1937, petition for rehearing now pending; *United States* v. *Richards*, 79 F. (2d) 797 (C. C. A. 6th), certiorari denied, 297 U. S. 718; *Bryant Paper Co.* v. *Holden*, 63 F. (2d) 370 (C. C. A. 6th), petition for rehearing denied with an opinion, 65 F. (2d) 1012, certiorari denied, 290 U. S. 631; *Swedish Iron & Steel Corporation* v. *Edwards*, 1 F. Supp. 335 (S. D. N. Y.), affirmed *per curiam* on the authority of the *Prentiss* case, 69 F. (2d) 1018 (C. C. A. 2d).

In *United States* v. *Mabel S. Andrews, Executrix of the Estate of Matthew Andrews, Deceased*, No. 48, October Term 1937, to be argued immediately before this case, the petitioner contends in its brief, as it contends here, that a second refund claim, filed after expiration of the period of limitation and relying on a ground different from the specific ground set forth in a timely claim, is not

an amendment of the first claim and is barred by the statute of limitations as construed by the cases cited above and by the applicable treasury regulations. The petitioner respectfully refers this Court to its brief in the *Andrews* case.

In the present case the timely refund claim did not charge overpayment of taxes generally, but asked for the refund of $3,105.65 upon the two specific grounds: (1) a deduction of $12,500.00 for the amortization of the cost of the drilling contract with the Union Oil Company, and (2) a redetermination of invested capital to include the unrecovered cost of the drilling contract. This claim did not leave the grounds in doubt, so that it might be said that the Commissioner had only himself to blame for not promptly rejecting it for insufficiency of form and insisting, at the outset, within the period of limitation, upon a specific claim. The claim was specific and the Commissioner was under a duty to consider the two limited questions it presented.

The untimely second claim, the "Statement * * * for the Purpose of Perfecting and Completing" the timely claim, presented for the first time the entirely new contention that the respondent realized no taxable income upon distributing, in kind, the oil it produced, and sought to recover the entire tax for 1919 in the sum of $5,178.33, or so much thereof as was refundable under the statute of limitations (R. 62–65).

The theories of recovery asserted in the two claims were wholly different. The first claim admitted, and did not require the Commissioner to consider, the existence of gross income, and limited itself entirely to the question of a proper deduction and a determination of invested capital. The second claim sought an entirely different inquiry by claiming that no income was realized. The investigation required to determine the merits of the first claim would not lead the Commissioner to consider the ground asserted in the late claim.

The decisions of this Court permitting amendments to timely refund claims after the period of limitation has expired are distinguishable because they involve cases in which timely *general* refund claims have been amplified and amended by late specific claims in situations where (1) a similar amendment to a complaint would be allowed and (2) under the usual administrative practice the Commissioner, in considering the timely general claim, would be required to ascertain the facts and grounds later formally set forth in the late amendment. *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62; *United States* v. *Factors & Finance Co.*, 288 U. S. 89; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373.

In *Bemis Bro. Bag Co.* v. *United States*, 289 U. S. 28, 32, there was "no change of importance, unless importance be attached to the form of the relief demanded." Under the administrative practice in that case the Commissioner, in order to

dispose of the timely claims, was required to investigate the basis of the late amendment.

Application of the two tests approved by this Court, amendment of pleadings and the administrative practice, discloses that the second claim in the present case was not an amendment of the first claim, but was a wholly new claim.

1. Under the most liberal rule of amendment of pleadings (*United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 68) a complaint stating a cause of action against the United States based on claimed deductions from gross income, and in this manner admitting or assuming existence of gross income, could not be changed after the statute of limitations had run into a cause of action based on the complete absence of income. Cf. *United States* v. *Seminole Nation*, 299 U. S. 417, 421–422.

2. The realities of administrative practice support the determination that the late claim here was not an amendment of the timely claim. The first claim assumed the existence of income and claimed specific deductions and obviously would not suggest consideration whether there was realized income. *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73.

These considerations indicate that the necessities and realities of administrative practice, involved where a refund claim on specific grounds of deductions from gross income is asserted, require the conclusion that such a claim may not be amended, after the period of limitation has expired, by a second claim on the wholly unrelated ground that

there was no income realized by the taxpayer. *United States* v. *Henry Prentiss & Co., supra; New York Trust Co.* v. *United States, supra; United States* v. *Richards, supra; Bryant Paper Co.* v. *Holden, supra.*

II

THE COMMISSIONER DID NOT WAIVE AND HAD NO POWER TO WAIVE THE STATUTORY REQUIREMENT FOR A TIMELY REFUND CLAIM

The court below held that the second claim was timely, as an amendment of the first claim, and therefore did not pass upon the question of waiver.

If this Court holds, as we contend in Point I, *supra,* that the second claim was not timely, as an amendment of the first claim, it will become necessary to determine whether the Commissioner waived, or had the power to waive, the objection based on the lateness of the second claim.

The respondent contended in the court below that the Commissioner waived this objection, citing *Tucker* v. *Alexander,* 275 U. S. 228; *United States* v. *Memphis Cotton Oil Co.,* 288 U. S. 62; *Reynolds* v. *McMurray,* 77 F. (2d) 740 (C. C. A. 10th); *United States* v. *Humble Oil & Refining Co.,* 69 F. (2d) 214 (C. C. A. 5th); *United States Paper Exports Ass'n* v. *Bowers,* 6 F. Supp. 735 (S. D. N. Y.); *Weihman* v. *United States,* 4 F. Supp. 155 (E. D. Pa.).

A. *The Commissioner did not waive the untimeliness of the second claim*

The late second claim asserted the new ground that the respondent, by distributing in kind the oil it produced, realized no income. The claim of waiver is based entirely on one remark, after the period of limitation had expired, in the letter dated August 12, 1929 (R. 37–38) to the effect that distribution of oil in kind represented a distribution of profits taxable to the respondent (R. 38). The trial court found that to the extent of that statement the Commissioner had considered the late contention on the merits (R. 66). The trial court did not find that this remark was or was intended to be a waiver of the period of limitations.

The facts disclose that no waiver was intended or occurred. The purpose of the letter of August 12, 1929 was to advise the respondent that the timely claim would be rejected on the merits and to give the respondent a hearing or conference on the proposed rejection if it was requested in writing. The letter does not state whether or not the merits of the late contention could be considered at the conference.

The conference took place on October 4, 1929 (R. 39). It does not appear whether the merits of the late claim were considered at the conference. It does appear, however, in the letter of November 13, 1929, that when the Commissioner acted after the conference he rejected the second conten-

tion solely because it was late. The merits of the late contention are not mentioned in that letter.

A waiver is defined as an intentional relinquishment of a known right. *Cordova* v. *Hood,* 17 Wall. 1, 7; *Champion Spark Plug Co.* v. *Automobile Sundries Co.,* 273 Fed. 74, 79 (C. C. A. 2d). A taxpayer's statutory waiver of the limitation to assess and collect income taxes, consented to by the Commissioner, is not a contract. *Florsheim Bros. Co.* v. *United States,* 280 U. S. 453, 466. Such waivers are voluntary, unilateral acts. *Stange* v. *United States,* 282 U. S. 270, 276. In *Florsheim Bros. Co.* v. *United States, supra,* this Court denied the taxpayer's contention that the Commissioner's consent to waivers for one year after expiration of the period of limitations was an agreement that Congress would not by statute extend the period of limitations applicable to these waivers. This Court stated at page 466:

> And obviously, the Commissioner did not undertake to limit the power of Congress to extend the period of limitations, as consideration for the waivers.

The Commissioner did not intend to attempt to waive the statute in the present case.

The Commissioner did not expressly waive the objection that the second claim was late. The respondent must rely on an implied waiver, after the period of limitations had expired, based solely on the one reference to the merits of the late claim. The respondent did not rely on this reference to its

damage because the period of limitation had already expired. A different situation might be presented if the Commissioner had referred to the merits of the new contention before the expiration of the period of limitation and the respondent claimed that such a reference led him to believe that the contention would be determined on the merits without filing a formal claim. Although express waivers may require no reliance upon them in order to assert them, waivers should not be readily implied in the absence of acts calculated to induce the other party to rely upon them to his detriment. *Victor Products Corp.* v. *Yates-American Machinery Co.*, 54 F. (2d) 1062, 1064 (C. C. A. 4th); *G. Amsinck & Co.* v. *Springfield Grocery Co.*, 7 F. (2d) 855 (C. C. A. 8th); cf. *Globe Mutual Insurance Co.* v. *Wolff*, 95 U. S. 326, 333. Implied waivers should be recognized only where acts clearly indicating abandonment of the right and inconsistent with assertion of the right appear. *Champion Spark Plug Co.* v. *Automobile Sundries Co.*, 273 Fed. 74, 79 (C. C. A. 2d).

In the present case the trial court failed to find such a waiver. We submit that the facts are entirely insufficient in the present case to constitute an implied waiver.

B. *After the expiration of the period of limitations the Commissioner had no power to waive the statutory requirement for a timely refund claim*

The petitioner contends that even if the facts are sufficient to constitute an implied waiver, the

Commissioner, after the period of limitation had expired, had no power to waive the petitioner's objection that this suit cannot be maintained because the claim upon which it is based was not filed within the period required by the statute.

Section 284 (b) (1) of the Revenue Act of 1926 provides that no refund shall be allowed after four years from the time the tax for 1919 is paid unless a claim therefor is filed within that period. Revised Statutes, Sec. 3226, as amended (Sec. 1113 (a), Revenue Act of 1926) provides that no suit shall be maintained unless a claim is filed in accordance with the law and regulations. The claim for refund which the statute requires "obviously relates to the claim which may be asserted by the suit." *United States* v. *Felt & Tarrant Co.*, 283 U. S. 269, 272.

The treasury regulation in effect when the second claim was filed on May 31, 1929, added to the statutory requirement the requirements that the refund claim should be on a prescribed form and should set forth each ground in detail under oath and should set forth the facts, and that no refund would be allowed except upon a ground set forth in a claim, or an amendment, filed prior to the expiration of the period of limitations. Treasury Decision 4265, VIII–1, Cumulative Bulletin, p. 110, amending Treasury Regulations 74, Art. 1254, Revenue Act of 1928.

If the late claim is not an amendment of the timely claim, it was barred when it was filed on

May 31, 1929, not only by the regulation but also by the statute, apart from the regulation, because the statute requires that the claim sued upon must be presented in time. *United States* v. *Felt & Tarrant Co., supra.* The petitioner submits that the Commissioner had no power, after expiration of the period of limitations, to waive the statutory requirement, as distinguished from the requirements of the regulations, and thereby to create a cause of action against the United States.

In *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, the distinction between the statute and the regulations is emphasized at page 71:

> The line of division must be kept a sharp one between the function of a statute requiring the presentation of a claim within a given period of time, and the function of a regulation making provision as to form. The function of the statute, like that of limitations generally, is to give protection against stale demands. The function of the regulation is to facilitate research. * * *

It is clear that Congress has not expressly or by implication conferred authority upon any Government officer to waive the statute of limitations in respect of suits against the United States. In the absence of statutory authority no Government officer has the power to waive the statute of limitations. *Finn* v. *United States,* 123 U. S. 227, 232; *Compagnie Generale Transatlantique* v. *United States,* 51 F. (2d) 1053, 1057 (C. C. A. 2d). This

rule is based upon the doctrine, often expressed in suits to recover internal revenue taxes, that a suit may not be brought against the United States unless it is clearly within the terms of the statute waiving sovereign immunity and granting consent to suit. *United States* v. *Michel,* 282 U. S. 656, 659; *Rock Island, etc., R. R. Co.* v. *United States,* 254 U. S. 141, 143; *Cheatham* v. *United States,* 92 U. S. 85, 88–89; *Nichols* v. *United States,* 7 Wall. 122, 130. A refund claim which complies with the statute is a jurisdictional condition precedent to suit. *Rock Island, etc., R. R. Co.* v. *United States,* 254 U. S. 141, 143; *United States* v. *Chicago Golf Club,* 84 F. (2d) 914 (C. C. A. 7th).

The fact that Congress did not intend that the Commissioner should have any general power to waive the period of limitations is indicated by the statutory grant of a limited extension of the period of limitations upon condition that the taxpayer execute a waiver of the limitation on assessment. Section 284 (g) of the Revenue Act of 1926 provides that if the taxpayer, before June 15, 1925, has filed a waiver of his right to have the taxes for 1919, the year in question here, assessed within five years, the time to file a refund claim for those taxes is extended to April 1, 1926, or until four years after payment of the tax. This express provision in the same section of the statute as the general limitation on refund, Section 284 (b) (1), indicates that Congress did not intend that the Com-

missioner should have the power to waive the general period of limitations.[1]

Section 608 of the Revenue Act of 1928, in effect before the alleged waiver claimed here occurred, provides that any refund after its enactment is erroneous (a) if made after the expiration of the period of limitation for filing claim therefor unless within such period a claim is filed; or (b) if made after expiration of the period of limitation for filing suits, unless (1) within such period suit was begun, or (2) the taxpayer and the Commissioner agreed in writing to suspend the running of the statute of limitations for filing suit pending final decision in some other pending case. Section 610 of the Revenue Act of 1928 provides that erroneous refunds may be recovered in actions by the United States within two years after the refund. These sections indicate clearly that the Commissioner has no power to waive the statute of limitations even by granting a refund. In the present case, even if the Commissioner had actually paid the refund and, to this extreme extent, attempted a waiver, the refund would be erroneous and could be recovered in an action by the United States.

These statutory provisions make it very clear that the Commissioner had no power to waive the

[1] Sec. 278 (c) of the Revenue Act of 1926 and Sec. 278 (f) (added by Sec. 506 (b) of the Revenue Act of 1928) also regulate taxpayers' express waivers.

statutory requirement for a refund claim. In *Daube* v. *United States,* 289 U. S. 367, this Court stated, at 372:

> High public interests make it necessary that there be stability and certainty in the revenues of government. These ends are not susceptible of attainment if periods of limitation may be disregarded or extended.

It has been stated, in cases like the present case in which the late claim is not an amendment of the timely claim, that the Commissioner has no power to waive the statutory requirement. *United States* v. *Richards,* 79 F. (2d) 797 (C. C. A. 6th), certiorari denied, 297 U. S. 718; *Bryant Paper Co.* v. *Holden,* 63 F. (2d) 370 (C. C. A. 6th), petition for rehearing denied with opinion, 65 F. (2d) 1012, certiorari denied, 290 U. S. 631.

In the *Bryant* case the court stated, at page 372:

> The Commissioner had no authority to extend the statute of limitations by allowing claims for overpayment which were not presented to him until they were barred by limitations.

In the *Richards* case the court stated, at page 801:

> It is no answer to say that the facts were already before the Commissioner by virtue of the deduction claimed in the original return and its disallowance. The required statutory method for bringing an assessment to the attention of the Commissioner is by

> a timely claim for refund, and without such claim there is nothing upon which the Comsioner may act.

It is true that despite the provision of Revised Statutes, Sec. 3226, as amended, to the effect that no suit may be maintained until a claim has been filed in accordance with the regulations, it has been held that the Commissioner, before the expiration of the period of limitations, may waive the requirement of the regulations that the supporting facts or reasons be stated in the claim. *Tucker* v. *Alexander,* 275 U. S. 228; cf. *United States* v. *Memphis Cotton Oil Co.,* 288 U. S. 62, 71.

In *Tucker* v. *Alexander, supra,* a timely refund claim and the complaint in the action to recover the tax alleged two specific grounds for refund, which were redetermination of the March 1, 1913, value of stock owned by the taxpayer and redetermination of the liquidation value of the stock in 1920. Upon the trial of the action, within the period of limitations, the taxpayer abandoned the two grounds alleged in its claim and in its complaint and asserted only the new ground that the Commissioner erred in deducting from the 1913 value of the stock, as a return of capital, the value of property distributed in May, 1913. Government counsel stated on the trial that the new question was the only one involved in the case and stipulated the amount to be recovered if the trial court held in favor of the taxpayer on the new ground. The trial court determined the new question on the merits in favor of

the Government. For the first time the lack of a sufficient refund claim was raised on appeal, and the Circuit Court of Appeals decided that the new claim could not be the basis of recovery because not asserted in the refund claim. 15 F. (2d) 356 (C. C. A. 8th). This Court held that there was an express waiver and that the Government's counsel had power, before expiration of the period of limitation, to waive the objection that the supporting facts or reasons were not stated in the claim. This Court stated, at page 231–232:

> If the Commissioner is not deceived or misled by the failure to describe accurately the claim, as obviously he was not here, it may be more convenient for the government, and decidedly in the interest of an orderly administrative procedure, that the claim should be disposed of upon its merits on a first trial without imposing upon government and taxpayer the necessity of further legal proceedings. We can perceive no valid reason why the requirements of the regulations may not be waived for that purpose. We are not unmindful of those cases holding that in suits against the government no officer of the government may waive statutes of limitations. *Finn* v. *United States,* 123 U. S. 227. Such waivers, if allowed, would defeat the only purpose of the statute and impose a liability upon the United States which otherwise would not exist—consequences which do not attach to the waiver here.

Tucker v. *Alexander,* does not hold that any requirement of the statute can be waived either before or after the expiration of the period of limitation. This is clarified by the fact that the Court in its opinion at page 231 mentioned the fact that the Solicitor General did not urge that the government's possible objection could not be waived. The objection involved is indicated by the Government's brief which stated at page 25 that the defect involved was in form and contents of the claim "prescribed not by the statute but by regulation" and that it seemed doubtful that public policy required that regulations could not be waived.

In the *Tucker* case, before the expiration of the period of limitations and on the trial of the action, the claim which was relied upon was presented to Government counsel who expressly waived the requirement of the regulations that the facts and reasons in support of the claim be set forth either in the claim then before the Commissioner or in another timely claim. That waiver relinquished no substantial right of the Government but only the procedural objection which if made would merely impose upon the Government and the taxpayer, as this Court stated at page 231 of its opinion, "the necessity of further legal proceedings" by requiring another timely refund claim and another timely suit.[2]

---

[2] The record, No. 167, October Term, 1927, shows that the 1920 return was filed, and the tax disclosed thereby, was paid on March 16, 1921. The additional tax for 1920 was paid on

In the present case, however, the expiration of the period of limitations before presentation of the claim now sued upon gave the Government a complete defense to any suit on that claim and deprived all courts of any jurisdiction in any suit on that claim. The Commissioner had no power thereafter, by express or implied waiver, to relinquish the sovereign immunity from suit on that claim.

The other cases relied upon by the respondent in the court below, page 13, *supra,* are distinguishable also because in none of them did the court state that the requirement of the statute could be waived after expiration of the period of limitations.

It is submitted that in the present case waiver of the statutory requirement after expiration of the period of limitations is involved. The Commissioner had no power to waive that requirement.

CONCLUSION

This suit upon the ground asserted for the first time after the expiration of the period of limitation is barred because the late claim was not an amendment of the timely claim. The Commissioner, after expiration of the period of limitation, did not waive, and had no power to waive, the objection that the statute of limitations had run before the late claim was presented. Therefore,

---

October 20, 1923, the refund claim was filed on November 2, 1923, and the trial occurred on June 12 and 13, 1925, within the four year period of limitations.

the judgment of the court below should be reversed and the judgment of the District Court should be reinstated.

Respectfully submitted.

STANLEY REED,
Solicitor General.
JAMES W. MORRIS,
Assistant Attorney General.
SEWALL KEY,
NORMAN D. KELLER,
HARRY MARSELLI,
Special Assistants to the Attorney General.
EDWARD J. ENNIS,
OLIVER HAMMONDS,
Attorneys.

NOVEMBER 1937.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid

during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

* * * * *

SEC. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

* * * * *

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 608. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST TAXPAYER

A refund of any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) made after the enactment of this Act, shall be considered erroneous—

(a) if made after the period of limitation for filing claim therefor, unless within such period claim was filed, or

(b) in the case of a claim filed within the proper time and disallowed by the Commissioner after the enactment of this Act, if the refund was made after the expiration of the period of limitation for filing suit, unless—

(1) within such period suit was begun by the taxpayer, or

(2) within such period, the taxpayer and the Commissioner agreed in writing to suspend the running of the statute of limitations for filing suit from the date of the agreement to the date of final decision in one or more named cases then pending before the United States Board of Tax Appeals or the courts.

SEC. 610. RECOVERY OF AMOUNTS ERRONEOUSLY REFUNDED

(a) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) refund of which is erroneously made, within the meaning of section 608, after the enactment of this Act, may be recovered by suit brought in the name of the United States, but only if such suit is begun within two years after the making of such refund.

(b) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) which has been erroneously refunded (if such refund would not be considered as erroneous under section 608) may be recovered by suit brought in the name of the United States, but only if such suit is begun before the expiration of two years after the making of such refund or before May 1, 1928, whichever date is later.

Treasury Decision 4265, VIII–1, Cumulative Bulletin 110 (amending Art. 1254 of Regulations 74, promulgated under the Revenue Act of 1928):

* * * * *

(1) A claim for refund or credit of any internal revenue tax, or for refund of interest or penalties, erroneously or illegally collected should be made on the form prescribed by the Treasury Department (Form 843), and should be filed with the collector of internal revenue, although a claim will not be considered defective solely by reason of the fact that it is not made on the form or that it is filed with the Commissioner of Internal Revenue. The claim must set forth in detail and under oath each ground upon which a refund or credit is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. Any claim which does not comply with the requirements of the preceding sentence will not be considered for any purpose as a claim for refund or credit.

(2) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds so set forth in a claim or an

amendment thereof filed prior to the expiration of such period.

(3) These regulations shall take effect on May 1, 1929, and shall be applicable to all claims filed on or after such date, and all other regulations are modified in so far as they are inconsistent with these regulations.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1933

BLANK

PAGE

FILE COPY

Office - Supreme Court, U. S
FILED
SEP 7 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1937.

No. 262

UNITED STATES OF AMERICA,

Petitioner,

vs.

GARBUTT OIL COMPANY, a corporation,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN B. MILLIKEN,
Attorney for Respondent,
808 Bank of America Building,
Los Angeles, California.

Of Counsel:
CLAUDE I. PARKER,
BAYLEY KOHLMEIER,
808 Bank of America Building,
Los Angeles, California.
L. A. LUCE,
937 Munsey Building,
Washington, D. C.

Parker & Baird Company, Law Printers, Los Angeles

BLANK

PAGE

SUBJECT INDEX.

PAGE

Opinions Below 3

Jurisdiction 3

Questions Presented 4

Statutes Involved 4

Statement of Facts 5

Argument 9

I.

The decision of the Circuit Court of Appeals herein is not in conflict with any decisions of any other Circuit Court of Appeals or with any decision of this court 9

II.

The decision of the Circuit Court herein is in accord with the decisions of this court and of other courts on the issues presented 12

III.

No important federal question is presented 14

IV.

The decision of the Circuit Court of Appeals herein can be sustained on another ground 15

Conclusion 17

TABLE OF AUTHORITIES CITED.

	PAGE
Bemis Bros. Bag Co. v. United States, 289 U. S. 28	12
Bryant Paper Co. v. Holden, 63 Fed. (2d) 370; certiorari denied 290 U. S. 631	9, 10
Con. P. Curran Printing Co. v. United States, 15 Fed. Supp. 153	13
George Moore Ice Cream Co. v. Rose, 289 U. S. 373	12
Judicial Code, Sec. 240(a)	3
New York Trust Co. v. United States, 87 Fed. (2d) 889	9, 10, 14
Reynolds v. McMurray (C. C. A. 10), 77 Fed. (2d) 740	16
Treasury Decision 4265—VIII-1 Cum. Bull. p. 110	14
Tucker v. Alexander, 275 U. S. 228	16
United States v. Factors & Finance Co., 288 U. S. 89	12
United States v. Henry Prentiss & Co., 288 U. S. 73	9, 11, 12
United States v. Humble Oil & Ref. Co. (C. C. A. 5), 69 Fed. (2d) 214	16
United States v. Memphis Cotton Oil Co., 288 U. S. 62	12, 13, 16
United States v. Richards, 79 Fed. (2d) 797; certiorari denied 297 U. S. 718	9, 10, 14
United States Paper Exports Ass'n v. Bowers (D. C. N. Y.), 6 Fed. Supp. 735	16
Weihman v. United States (D. C. Pa.), 4 Fed. Supp. 155	16
Youngstown Sheet & Tube Co. v. United States, 7 Fed. Supp. 290; certiorari denied 293 U. S. 599	10, 13, 14

INDEX TO APPENDIX.

	PAGE
Regulations 74, Art. 1254, as amended by Treasury Decision 4265 (Cum. Bull. VIII-1, p. 110)	21
Revenue Act of 1926, Sec. 284(a) and (b)	20
Revenue Act of 1926, Sec. 1113	19

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1937.

No. 262

UNITED STATES OF AMERICA,

Petitioner,

vs.

GARBUTT OIL COMPANY, a corporation,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below.

The memorandum of conclusions handed down by the District Court [R. 51-52] is unreported. The opinion of the Circuit Court of Appeals [R. 85] is reported at 89 Fed. (2d) 749.

Jurisdiction.

The Judgment of the Circuit Court of Appeals was entered April 28, 1937 [R. 89]. The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

(1) Whether a duly filed claim for refund of an overpayment of income taxes, in which specific grounds are stated, may be amended after the statutory period has expired, *but before the Commissioner of Internal Revenue has acted upon the original claim,* to state a new ground in support of the refund.

(2) Whether, in considering on their merits grounds and contentions set forth for the first time in an amendment to a timely claim for refund, which amendment was filed after the expiration of the statutory period but before the Commissioner acted upon the original claim, the Commissioner waived any defects in or objections to the claim for refund.

Note: The question as stated by petitioner is incomplete in that it omits the fact that the amendment to the claim for refund was filed before the original claim had been acted upon by the Commissioner.

The second question above was not expressly discussed in the opinion of the Circuit Court of Appeals.

Statutes Involved.

The statutes and regulations involved are contained in the appendix hereto.

Statement of Facts.

Appellant, a California corporation, was organized in 1907, and on October 3, 1907 acquired a lease of certain oil property. Oil was discovered and thereafter, including the entire year 1919, the only business engaged in by appellant was the production and disposition of oil from this property [Stipulation of Facts VIII, R. 49; Findings of Fact VII, R. 66.]

On April 10, 1911 appellant, by its Board of Directors, duly adopted a resolution providing in effect that all oil produced by appellant after January 1, 1911 should be assigned to appellant's lessors under the lease to the extent of their royalty interests and to appellant's stockholders to the extent of their holdings of stock, *pro rata,* in kind, so long as the stockholders should pay calls for money necessary to cover all expenses of appellant. That resolution remained in full force and effect at all times subsequent to April 10, 1911 to and including the entire year 1919 [Findings of Fact VIII, R. 66; Stipulation of Facts IX, R. 49, 50.]

Thereafter appellant distributed the oil in kind, as it was produced, to its lessors and stockholders in accordance with their respective interests as provided in said resolution [Findings of Fact VIII, R. 66.] As all the oil produced by appellant was distributed in kind it realized no income therefrom [Conclusions of Law IV, R. 68] and as its only activity was the production of oil appellant had no taxable income whatsoever during the year 1919.

Due to a misconception of the law, appellant believed that it realized income from the production of the oil and in its income and excess profits tax return for the year 1919 appellant reported net income in the amount of $16,928.61 and a tax liability for said year of $2,072.68 which tax was paid during the year 1920 [R. 53]. Thereafter the Commissioner of Internal Revenue determined and assessed an additional tax of $3,105.65 against appellant for said year [Findings of Fact III, R. 54]. Appellant paid said additional tax of $3,105.65 on April 3, 1925 [Findings of Fact IV, R. 54].

On March 30, 1929 appellant filed with the Collector of Internal Revenue at Los Angeles, California, its claim for refund on Form 843 of income and excess profits taxes overpaid by it for the year 1919 in the amount of $3,105.65 [Findings of Fact V, R. 54]. In said claim for refund appellant contended (1) that it was entitled to an additional deduction for the amortization of the cost of a certain drilling contract, and (2) that its invested capital as determined by the Commissioner of Internal Revenue for excess profits tax purposes was understated by reason of the failure to include therein the unrecovered value of the said drilling contract. Appellant stated the facts in support of these contentions [Findings of Fact V, R. 54-62]. On May 31, 1929, while the claim for refund of March 30, 1929 was being considered by the Commissioner of Internal Revenue, appellant filed a duly sworn statement entitled "Statement of Garbutt Oil Company, Los Angeles, California, for the Purpose of Perfecting and Completing Claim for Refund Covering Alleged Overpayment of Income Tax for the Calendar Year 1919". In said statement of May 31, 1929 appellant set forth as an additional reason in support of its claim for refund that

because of the distribution of its oil in kind appellant had realized no taxable income during the year 1919 and set forth the additional facts in support of this additional contention [Findings of Fact VI, R. 62-65].

The Commissioner of Internal Revenue undertook to treat the supplemental statement of May 31, 1929 as a valid amendment of appellant's original claim for refund filed on March 30, 1929 and undertook to consider on their merits the contentions and grounds advanced by appellant in said supplemental statement of May 31, 1929 [Findings of Fact VI, R. 66], and on August 12, 1929 the Commissioner sent to appellant a letter notifying appellant that its claim for refund would be rejected. In regard to appellant's contention that it realized no taxable income in 1919 the Commissioner stated in said letter of August 12, 1929—"This office holds that the distribution of oil in excess of the expenses contributed represents a distribution of profits which are taxable to the corporation" [Findings of Fact VI, R. 66; Stipulation of Facts, V, R. 48; Complaint, Ex. D, R. 37].

On November 13, 1929 the Commissioner of Internal Revenue sent to appellant another letter notifying appellant that its claim would be rejected. In said letter of November 13, 1929 the Commisisoner stated that the supplemental statement of May 31, 1929 would not be considered as an amendment to the original claim as it was filed after the expiration of the statutory period of limitation [Stipulation of Facts VI, R. 48; Complaint, Ex.

E, R. 39]. The Commissioner formally rejected appellant's claim on November 21, 1929 [Stipulation of Facts VII, R. 48].

Appellant filed suit in the United States District Court for the Southern District of California for the recovery of said overpayment of taxes for the year 1919. In its complaint appellant alleged as grounds for recovery the facts and contentions contained in its original claim of March 30, 1929 and those contained in its supplemental statement of May 31, 1929 [R. 7-42].

The District Court concluded that appellant realized no taxable income during the year 1919 from the production and distribution of oil [Conclusions of Law IV, R. 68] but further concluded that the supplemental statement of May 31, 1929 did not constitute an amendment to appellant's original claim for refund filed on March 30, 1929 [Conclusions of Law I, R. 67], and since said supplemental statement was filed after the expiration of the statutory period, and since the grounds upon which recovery could be based were first stated in the supplemental statement, appellant was not entitled to recover [Conclusions of Law II, III and V, R. 67 and 68]. Upon these conclusions judgment was rendered for appellee.

The Circuit Court of Appeals determined that the amendment to the claim for refund filed May 31, 1929 was a proper amendment to the original claim for refund filed March 30, 1929 and reversed the judgment of the District Court [R. 88].

ARGUMENT.

I.

The Decision of the Circuit Court of Appeals Herein Is Not in Conflict With Any Decisions of Any Other Circuit Court of Appeals or With Any Decision of This Court.

The petitioner contends that the decision of the Circuit Court of Appeals herein is in conflict with the decisions of the Circuit Court of Appeals for the Sixth Circuit in *United States v. Richards* (1935), 79 Fed. (2d) 797, certiorari denied, 297 U. S. 718, and *Bryant Paper Co. v. Holden* (1932), 63 Fed. (2d) 370, certiorari denied, 290 U. S. 631, and with the decision of the Circuit Court of Appeals for the Second Circuit in *New York Trust Company v. United States* (1937), 87 Fed. (2d) 889, certiorari denied June 1, 1937, and also with the decision of this court in *United States v. Henry Prentiss & Co.*, (1933), 288 U. S. 73. An examination of the decisions referred to discloses that each is distinguishable on the facts and is based upon a different principle of law.

In *United States v. Richards, supra,* the court determined that the original claim for refund had been rejected *before* the amended claim was filed. Furthermore, the original claim concerned the allocation of dividends received by the taxpayer and required examination of the books of the dividend-paying corporations, and the amended claim concerned the deduction of excess profits taxes paid by a partnership of which the taxpayer was a member and required examination of the affairs and books of the partnership which was a separate entity and in no way connected with the corporations. In its decision the Circuit Court determined that the amendment was

not proper for the reason that the amendment required the examination of entirely new fields and the affairs of a new and separate entity. In the case at bar both the original claim and the amendment concerned the income of the taxpayer only and in no way required examination of the books or the affairs of any other entity.

In *Bryant Paper Co. v. Holden, supra,* the court determined that the amended claim was an independent demand which did not seek to relate itself to the original claim. In *Youngstown Sheet & Tube Co. v. United States* (Ct. Cl. 1934), 7 Fed. Supp. 290, certiorari denied, 293 U. S. 599, the Court of Claims, after considering facts almost identical with the facts presented in the case at bar, held that the amendment was timely. In its opinion the Court of Claims discusses and distinguishes *Bryant Paper Co. v. Holden, supra.* This court denied certiorari in *Youngstown Sheet & Tube Co. v. United States* (293 U. S. 599).

New York Trust Company v. United States, supra is very similar to *United States v. Richards, supra.* In that case also the court determined that the original claim had been rejected *before* the amended claim was filed. The amended claim also required an examination of the records of another taxpayer. The court followed *United States v. Richards, supra,* and stated (87 Fed. (2d) 891):

> "When the amendment requires examination of the records of another taxpayer, we think that inquiry is forced into paths too far removed from those to which the original claim directed it. We agree with the view expressed by the Sixth Circuit in the Richards Case."

In its opinion the court suggests that *United States v. Richards, supra,* and *Youngstown Sheet & Tube Co. v. United States, supra,* are distinguishable.

In *United States v. Henry Prentiss Co.* (1933), 288 U. S. 73, the taxpayer attempted to convert a request for discretionary relief into a claim of right under the statute after the statutory period had expired and after the taxpayer had waived and abandoned any claims under the statute. In the case at bar there was never at any time any request for discretionary relief. The original claim was based on statutory grounds and the amendment merely added another statutory ground. There was no inconsistency between the grounds advanced in the original claim and those advanced in the amendment. The original claim asked for additional deductions for amortization and in the amended claim it was contended that respondent realized no taxable income during the year. It is true that if respondent had no income it could not use the deductions but it might nevertheless be entitled to them. There are many instances in which a taxpayer cannot use deductions to which he is entitled merely because he has no income against which to use them but there is no inconsistency between a claim for deductions and a claim that the taxpayer has no income. A taxpayer's contention that he had no income does not constitute an abandonment of a concurrent alternative claim that he was entitled to additional deductions if it is determined that he did have income. In the case at bar there was no abandonment of the grounds of the first claim when the amendment was filed. Respondent continued to urge both contentions before the Commissioner, both contentions were considered by the Commissioner in passing on the claim, and both contentions were alleged by respondent in its complaint in the District Court.

It is submitted that the decision of the Circuit Court of Appeals herein is not in conflict with any of the above decisions.

II.

The Decision of the Circuit Court Herein Is in Accord With the Decisions of This Court and of Other Courts on the Issues Presented.

The general issue presented in the case at bar is not a new one; it has been considered in a series of decisions by this court.

United States v. Memphis Cotton Oil Co. (1933), 288 U. S. 62;

United States v. Henry Prentiss Co. (1933), 288 U. S. 73;

United States v. Factors & Finance Co. (1933), 288 U. S. 89;

Bemis Bros. Bag Co. v. U. S. (1933), 289 U. S. 28;

George Moore Ice Cream Co. v. Rose (1933), 289 U. S. 373.

In the above cases this court has considered and passed upon the various phases of the question of when and to what extent a timely claim for refund may be amended after the time for filing a new claim has expired. In the opinions rendered in the above cases this court has discussed the problem at length and has stated the rules for the determination of when and under what circumstances an amendment is proper and timely.

The exact issue presented in this case was presented to the Court of Claims in *Youngstown Sheet & Tube Co.*

v. United States (Ct. Cl. 1934), 7 Fed. Supp. 290. In its opinion in that case the Court of Claims stated the question as follows:

> "This brings us to the crux of the case. May a claim which assigns a specific ground for recovery (here deductions from gross income) be amended or supplemented, after the statute has run for filing a new claim, but before the Commissioner has finally acted on the original claim, in order to permit a taxpayer to claim additional deductions and thereby secure a greater refund than would have been permitted on account of the specific ground assigned in the original claim?"

After carefully reviewing the decisions of this court, the Court of Claims decided that the issue was within the rules announced by this court and was timely and proper. Certiorari was denied (293 U. S. 599).

On similar facts the Court of Claims reached the same conclusion in *Con. P. Curran Printing Co. v. United States* (1936), 15 Fed. Supp. 153, certiorari denied April 26, 1937.

It is submitted that the Circuit Court of Appeals in its decision herein and the Court of Claims in its decision in *Youngstown Sheet & Tube Co. v. United States* (Ct. Cl. 1934), 7 Fed. Supp. 290, correctly concluded that the issue presented is determined by the decision of this court in *United States v. Memphis Cotton Oil Co.* (1933), 288 U. S. 62, and the other decisions cited above.

III.

No Important Federal Question Is Presented.

As stated above, the various phases of the questions presented in this petition have been exhaustively considered and passed upon by this court in previous decisions. There is no more urgent or important federal question presented here than was presented in *Youngstown Sheet & Tube Co. v. United States* (Ct. Cl. 1934), 7 Fed. Supp. 290; *United States v. Richards* (1935), 79 Fed. (2d) 797, and *New York Trust Company v. United States* (1937), 87 Fed. (2d) 889. Also if *United States v. Richards, supra* and *New York Trust Co. v. United States, supra* are in conflict with the decision herein, they were likewise in conflict with the decision in *Youngstown Sheet & Tube Co. v. United States, supra.* Yet certiorari was denied in those cases.

Petitioner suggests that a new problem is presented by the change in the regulations resulting from Treasury Decision 4265—VIII-1 Cum. Bull. p. 110. It is submitted that the decisions of this court in regard to the issues here presented in the cases above referred to were not based upon the peculiar wording of the regulations prior to the amendment of Treasury Decision 4265 and that the principles announced in the decisions of this court are fully applicable to the regulations as amended by Treasury Decision 4265.

IV.

The Decision of the Circuit Court of Appeals Herein Can Be Sustained on Another Ground.

The decision of the Circuit Court of Appeals herein can be sustained upon a ground not expressly discussed in its opinion. The record in this case shows that the Commissioner of Internal Revenue considered on their merits the contentions and claims advanced by the taxpayer in its amended claim [R. 66,; R. 37.] In his original notice of rejection the Commissioner made no mention of the fact that the amended claim was filed after the time had expired for the filing of a new claim but treated the amended claim as a proper and timely amendment and considered it on its merits [R. 66, R. 37].

The object and purpose of a claim for refund is to give the Commissioner of Internal Revenue an opportunity to correct the error alleged before resort is had to the courts. The requirements prescribed by the regulations in regard to the form and content of claims for refund are for the purpose of advising the Commissioner of the facts and the contentions of the taxpayer and to facilitate the investigation of the claim. If the Commissioner is fully advised in regard to the facts and contentions without strict compliance by the taxpayer with the formal requirements of the regulations the purpose of the regulations has nevertheless been fulfilled and the defects in

the claim may be waived by the Commissioner, either expressly or by consideration of the claim on its merits.

Tucker v. Alexander (1927), 275 U. S. 228;

United States v. Memphis Cotton Oil Co. (1933), 288 U. S. 62;

United States v. Humble Oil & Ref. Co. (C. C. A. 5, 1934), 69 Fed. (2d) 214;

Reynolds v. McMurray (C. C. A. 10, 1935), 77 Fed. (2d) 740;

United States Paper Exports Ass'n, v. Bowers (D. C. N. Y., 1934), 6 Fed. Supp. 735;

Weihman v. United States (D. C. Pa., 1933), 4 Fed. Supp. 155.

In the case at bar the Commissioner was not only fully advised in regard to the facts and the taxpayer's contentions before he acted upon the claim but he also considered all the contentions on their merits. It was not until after the contentions had been fully considered that the Commissioner raised any question in regard to the sufficiency of the original claim or the timeliness of the amendment thereto. It is submitted that in considering on their merits the contentions advanced in the amendment to the claim for refund the Commissioner waived compliance of the formal requirements of the regulations and waived any defects which may have existed in the claim for refund.

Conclusion.

In conclusion respondent submits:

(1) That the decision of the Circuit Court of Appeals herein is not in conflict with any decision of any other Circuit Court or of this court and is in entire accord with the decisions of this court and with the decisions of the lower courts on the questions here presented;

(2) That there is no important federal question involved which has not been fully considered in decisions of this court heretofore rendered;

(3) That upon the facts in this case the decision of the Circuit Court of Appeals is proper and can be sustained upon another ground not expressly discussed in the opinion of the court.

WHEREFORE, it is submitted that the petition should be denied.

JOHN B. MILLIKEN,
Attorney for Respondent,
808 Bank of America Building,
Los Angeles, California.

Of Counsel:

CLAUDE I. PARKER,
BAYLEY KOHLMEIER,
808 Bank of America Building,
Los Angeles, California.

L. A. LUCE,
937 Munsey Building,
Washington, D. C.

August, 1937.

BLANK

PAGE

APPENDIX.

Revenue Act of 1926—Section 1113.

Sec. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

(b) This section shall not affect any proceeding in court instituted prior to the enactment of the Revenue Act of 1924.

Revenue Act of 1926—Section 284(a) and (b).

Sec. 284(a). Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c), (d), (e) and (g) of this section:

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

Regulations 74, Article 1254, as amended by T. D. 4265 (Cum. Bull. VIII-1, p. 110).

(1) A claim for refund or credit of any internal revenue tax, or for refund of interest or penalties, erroneously or illegally collected should be made on the form prescribed by the Treasury Department (Form 843), and should be filed with the collector of internal revenue, although a claim will not be considered defective solely by reason of the fact that it is not made on the form or that it is filed with the Commissioner of Internal Revenue. The claim must set forth in detail and under oath each ground upon which a refund or credit is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. Any claim which does not comply with the requirements of the preceding sentence will not be considered for any purpose as a claim for refund or credit.

(2) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds so set forth in a claim or an amendment thereof, filed prior to the expiration of such period.

(3) These regulations shall take effect on May 1, 1929, and shall be applicable to all claims filed on or after such date, and all other regulations are modified in so far as they are inconsistent with these regulations.

BLANK

PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 262.

UNITED STATES OF AMERICA, *Petitioner*,

v.

GARBUTT OIL COMPANY, a corporation, *Respondent*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR THE RESPONDENT.

JOHN B. MILLIKEN,

808 Bank of America Bldg.
Los Angeles, California

L. A. LUCE,

937 Munsey Building,
Washington, D. C.

Counsel for Respondent.

Of Counsel:

CLAUDE I. PARKER,
BAYLEY KOHLMEIER,

808 Bank of America Bldg.,
Los Angeles, California.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

BLANK

PAGE

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes and Regulations Involved	2, 28
Statement of Facts	2
Summary of Argument	5
Argument	7
I. The Amendment to the Claim for Refund, Being Filed Before the Commissioner of Internal Revenue Acted Upon the Original Claim, Was Proper and Timely	7
The original claim for refund and the amendment complied with the requirements of the statutes and the regulations	8
The amendment to the claim for refund was proper and timely under the rule of the decisions of this court	15
II. In Considering the Grounds and Contentions Advanced in the Amendment on Their Merits, the Commissioner of Internal Revenue Waived Any Defects in or Objections to the Claim for Refund	21
Conclusion	27
Appendix	28

CASES CITED

Andrews v. United States, 17 F. Supp. 980	20
Bemis Bros. Bag Co. v. United States (1933), 289 U. S. 28; 53 S. Ct. 454, 77 L. Ed. 1011	8, 15
Bertelsen v. White (D. C. Mass. 1932), 58 F. (2d) 792; aff'd. (C. C. A.-1, 1933), 65 F. (2d) 719	14
Bowe-Burke Mining Co. v. Willcuts (D. C. Minn. 1930), 45 F. (2d) 394	14
Bryant Paper Co. v. Holden, 63 Fed. (2d) 370	15, 18

Page

Champion Spark Plug Co. v. Automobile Sundries Co. (C. C. A.-2, 1921), 273 Fed. 74 25
Chicago Junction Railways v. United States (Ct. Cls. 1935), 10 F. Supp. 156 14
Con. P. Curran Printing Co. v. United States (Ct. Cls. 1936), 15 F. Supp. 153 ..... 15, 20
Continental-Illinois National Bank & Trust Co. v. United States (C. C. A.-7, 1932), 67 F. (2d) 153... 10
Dascomb v. McCuen (C. C. A.-2, 1934), 73 F. (2d) 417 10
Edward E. Rieck v. Commissioner, 35 B. T. A. 1178.. 14, 15, 20
George Moore Ice Cream Co. v. Rose (1933), 289 U. S. 373; 53 S. Ct. 620, 77 L. Ed. 1265.....8, 15, 19
Lewis v. Reynolds (1932), 284 U. S. 281, 53 S. Ct. 145, 76 L. Ed. 293 .....12, 14
Marks v. United States (D. C. N. Y. 1937), 18 F. Supp. 911 ..... 15, 20
Marine Iron Works v. Wiess (C. C. A.-5, 1906), 148 Fed. 145 25
Mitchell v. Kemp & Burpee Mfg. Co. (C. C. A.-3, 1915), 218 Fed. 843 25
National Park Bank v. United States (C. C. A.-2, 1933), 65 Fed. 415 20
New York Trust Company v. United States (C. C. A.-2, 1937), 87 F. (2d) 889 .....15, 17
Nichols v. United States, 7 Wall. 122, 19 L. Ed. 125.... 10
Reynolds v. McMurray (C. C. A.-10, 1935), 77 F. (2d) 740 ..... 22, 25
Staton v. United States (D. C. Okla. 1935), 9 F. Supp. 428 ..... 15, 20
Swedish Iron & Steel Corporation v. Edwards (D. C. N. Y. 1932), 1 F. Supp. 335 ..... 15, 18
Townsend v. Jemison, 7 How. 706, 12 L. Ed. 880..... 26
Tucker v. Alexander (1927), 275 U. S. 228, 48 S. Ct. 45, 72 L. Ed. 253 .....11, 21, 22
U. S. Paper Exports Ass'n. v. Bowers (D. C. N. Y., 1934), 6 F. Supp. 735 .....22, 23
United States v. Memphis Cotton Oil Co. (1933), 288 U. S. 62; 53 S. Ct. 278, 77 L. Ed. 619 8, 11, 12, 15, 19, 21, 22
United States v. Henry Prentiss Co. (1933), 288 U. S. 73; 53 S. Ct. 283, 77 L. Ed. 626 .....8, 15

Page

United States v. Humble Oil & Ref. Co. (C. C. A.-5, 1934), 69 F. (2d) 740 ..... 20, 22, 23, 25
United States v. Richards (C. C. A.-6, 1935), 79 F. (2d) 797 ..... 15, 18
United States v. Felt & Tarrant Mfg. Co. (1931), 283 U. S. 269, 51 S. Ct. 376, 75 L. Ed. 1025 10
United States v. Factors & Finance Co. (1933), 288 U. S. 89; 53 S. Ct. 287, 77 L. Ed. 633 ..... 8, 15
Weihman v. United States (D. C. Pa., 1933), 4 F. Supp. 155 22
Youngstown Sheet & Tube Co. v. United States (Ct. Cls. 1934), 7 F. Supp. 290 ..... 15, 19, 20

BLANK

PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 262.

UNITED STATES OF AMERICA, *Petitioner,*

v.

GARBUTT OIL COMPANY, a corporation, *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The memorandum of conclusions handed down by the District Court (R. 51-52) is unreported. The opinion of the Circuit Court of Appeals (R. 85) is reported at 89 Fed. (2d) 749.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered April 28, 1937 (R. 89). The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as

amended by the Act of February 13, 1925. Petition for a writ of certiorari was granted October 11, 1937.

QUESTIONS PRESENTED.

(1) Whether a duly filed claim for refund of an overpayment of income taxes, in which specific grounds are stated, may be amended after the statutory period has expired, *but before the Commissioner of Internal Revenue has acted upon the original claim,* to state a new ground in support of the refund.

(2) Whether, in considering on their merits grounds and contentions set forth for the first time in an amendment to a timely claim for refund, which amendment was filed after the expiration of the statutory period but before the Commissioner acted upon the original claim, the Commissioner waived any defects in or objections to the claim for refund.

STATUTES INVOLVED.

The statutes and regulations involved are contained in the appendix hereto.

STATEMENT OF FACTS.

This action was filed in the United States District Court for the recovery of income and excess profits taxes overpaid by respondent for the year 1919. The only issue now presented is whether the action was based upon a proper claim for refund.

Respondent, a California corporation, was organized in 1907, and on October 3, 1907 acquired a lease of certain oil property. Oil was discovered and thereafter, including the entire year 1919, the only business engaged in by respondent was the production and disposition of oil from this property (Stipulation of Facts VIII, R. 49; Findings of Fact VII, R. 66).

On April 10, 1911 respondent, by its Board of Directors, duly adopted a resolution providing in effect that all oil

produced by respondent after January 1, 1911 should be assigned to respondent's lessors under the lease to the extent of their royalty interests and to respondent's stockholders to the extent of their holdings of stock, *pro rata*, in kind, so long as the stockholders should pay calls for money necessary to cover all expenses of respondent. That resolution remained in full force and effect at all times subsequent to April 10, 1911 to and including the entire year 1919 (Findings of Fact VIII, R. 66; Stipulation of Facts IX, R. 49, 50).

Thereafter respondent distributed the oil in kind, as it was produced, to its lessors and stockholders in accordance with their respective interests as provided in said resolution (Findings of Fact VIII, R. 66). As all the oil produced by respondent was distributed in kind it realized no income therefrom (Conclusions of Law IV, R. 68) and as its only activity was the production of oil respondent had no taxable income whatsoever during the year 1919.

Due to a misconception of the law, respondent believed that it realized income from the production of the oil and in its income and excess profits tax return for the year 1919 respondent reported net income in the amount of $16,928.61 and a tax liability for said year of $2,072.68 which tax was paid during the year 1920 (R. 53). Thereafter the Commissioner of Internal Revenue determined and assessed an additional tax of $3,105.65 against respondent for said year (Findings of Fact III, R. 54). Respondent paid said additional tax of $3,105.65 on April 3, 1925 (Findings of Fact IV, R. 54).

On March 30, 1929 respondent filed with the Collector of Internal Revenue at Los Angeles, California, its claim for refund on Form 843 of income and excess profits taxes overpaid by it for the year 1919 in the amount of $3,105.65 (Findings of Fact V, R. 54). In said claim for refund respondent contended (1) that it was entitled to an additional deduction for the amortization of the cost of a certain drilling contract, and (2) that its invested capital as determined

by the Commissioner of Internal Revenue for excess profits tax purposes was understated by reason of the failure to include therein the unrecovered value of the said drilling contract. Respondent stated the facts in support of these contentions (Findings of Fact V, R. 54-62). On May 31, 1929, while the claim for refund of March 30, 1929 was being considered by the Commissioner of Internal Revenue, respondent filed a duly sworn statement entitled "Statement of Garbutt Oil Company, Los Angeles, California, for the Purpose of Perfecting and Completing Claim for Refund Covering Alleged Overpayment of Income Tax for the Calendar year 1919". In said statement of May 31, 1929 respondent set forth as an additional reason in support of its claim for refund that because of the distribution of its oil in kind respondent had realized no taxable income during the year 1919 and set forth the additional facts in support of this additional contention (Findings of Fact VI, R. 62-65).

The Commissioner of Internal Revenue undertook to treat the supplemental statement of May 31, 1929 as a valid amendment of respondent's original claim for refund filed on March 30, 1929 and undertook to consider on their merits the contentions and grounds advanced by respondent in said supplemental statement of May 31, 1929 (Findings of Facts VI, R. 66), and on August 12, 1929 the Commissioner sent to respondent a letter notifying respondent that its claim for refund would be rejected. In regard to respondent's contention that it realized no taxable income in 1919 the Commissioner stated in said letter of August 12, 1929—"This office holds that the distribution of oil in excess of the expenses contributed represents a distribution of profits which are taxable to the corporation" (Findings of Fact VI, R. 66; Stipulation of Facts, V, R. 48; Complaint, Ex. D, R. 37).

On November 13, 1929 the Commissioner of Internal Revenue sent to respondent another letter notifying respondent that its claim would be rejected. In said letter of November 13, 1929 the Commissioner stated that the supplemental

statement of May 31, 1929 would not be considered as an amendment to the original claim as it was filed after the expiration of the statutory period of limitation (Stipulation of Facts VI, R. 48; Complaint, Ex. E, R. 39). The Commissioner formally rejected respondent's claim on November 21, 1929 (Stipulation of Facts VII, R. 48).

Respondent filed suit in the United States District Court for the Southern District of California for the recovery of said overpayment of taxes for the year 1919. In its complaint respondent alleged as grounds for recovery the facts and contentions contained in its original claim of March 30, 1929 and those contained in its supplemental statement of May 31, 1929 (R. 7-42).

The District Court concluded that respondent realized no taxable income during the year 1919 from the production and distribution of oil (Conclusions of Law IV, R. 68) but further concluded that the supplemental statement of May 31, 1929 did not constitute an amendment to respondent's original claim for refund filed on March 30, 1929 (Conclusions of Law I, R. 67), and since said supplemental statement was filed after the expiration of the statutory period, and since the grounds upon which recovery could be based were first stated in the supplemental statement, respondent was not entitled to recover (Conclusions of Law II, III and V, R. 67 and 68). Upon these conclusions judgment was rendered for the United States.

The Circuit Court of Appeals determined that the amendment to the claim for refund filed May 31, 1929 was a proper amendment to the original claim for refund filed March 30, 1929 and reversed the judgment of the District Court (R. 88).

SUMMARY OF ARGUMENT.

I. The statutes which provide for the refund of taxes erroneously collected impose no requirements or conditions in regard to the form or contents of claims for refund. The statutes merely require that a claim be filed with the Commissioner of Internal Revenue within a specified period.

The requirements in regard to the form and contents of claims for refund are set forth in the regulations and rulings of the Commissioner of Internal Revenue. The purpose of the regulations is to facilitate research in the investigation of the claim and a timely claim which does not comply with the regulations may be amended to do so after the expiration of the period for filing new claims, provided the amendment is made before the claim is acted upon by the Commissioner and is not inconsistent with the original claim.

In the case at bar the statute was complied with in that a claim for the full amount sought to be recovered was filed before the expiration of the statutory period and the regulations were complied with in that the specific grounds for recovery were fully set forth in an amendment which was filed with the Commissioner before he had acted upon the original claim. Also the original claim and the amendment were treated by the Commissioner as one claim and the grounds alleged in the amendment were considered on their merits.

II. The requirements of the regulations in regard to the form and contents of claims for refund may be waived by the Commissioner of Internal Revenue either expressly or impliedly. In the case at bar in treating the original claim and the amendment as one claim, and in considering on their merits the grounds and contentions stated by respondent in the amendment, the Commissioner waived the defect of the original claim which resulted from the failure to set forth all the grounds relied upon by the claimant.

ARGUMENT.

I.

The Amendment to the Claim for Refund, Being Filed Before the Commissioner of Internal Revenue Acted Upon the Original Claim, Was Proper and Timely.

This action was filed in the United States District Court for the recovery of $3,105.65 of the income and excess profits taxes overpaid by respondent for the year 1919, which was paid on April 3, 1925. The action was based upon a claim for refund which was filed on March 30, 1929 (R. 54) within the time provided by statute and an amendment which was filed on May 31, 1929 (R. 62-65) after the expiration of the period within which a new claim could have been filed but while the original claim was still under consideration by the Commissioner of Internal Revenue. The original claim asked for the refund of $3,105.65 on the grounds that respondent was entitled to an additional deduction for leasehold amortization and that respondent's invested capital had been understated (R. 54). The amendment to the claim alleged that respondent realized no taxable income during the year 1919 and asked for the refund of such amount as could be legally refunded (R. 62-65). In a letter dated August 12, 1929 the Commissioner notified respondent that its claim would be rejected and in said letter he discussed the merits of the contentions advanced by respondent in the amendment as well as in the original claim (R. 37, 48, 66). No mention was made of the fact that the amendment was filed after the expiration of the statutory period. In a letter dated November 13, 1929 the Commissioner again notified respondent that its claim would be rejected and in this letter he stated that respondent's contentions advanced in the amendment would be rejected because the amendment was filed too late (R. 39, 48). The claim was formally rejected on November 21, 1929 (R. 48). Within the time provided by law respondent filed this action in the District Court and

alleged the grounds advanced in the orginal claim and the amendment (R. 7-42). The District Court found that respondent had no taxable income for the year 1919 but further held that the amended clam was not timely filed and that the action was therefore not based upon a proper claim for refund (R. 67, 68) and rendered judgment for the United States (R. 69). On appeal by respondent the Circuit Court determined that the amendment was proper and timely and reversed the judgment of the District Court. Thus the overpayment of the tax is now admitted and the only issue here presented is whether the action is based upon a proper claim for refund and that issue depends upon whether the amendment was proper and timely, or if not, whether the Commissioner, in considering on their merits the contentions presented in the amendment, waived the defect of the original claim in not stating the facts in regard to this contention.

The original claim for refund and the amendment complied with the requirements of the statutes and the regulations.

The general question presented in the case at bar, namely, when and to what extent a timely claim for refund of income taxes may be amended after the expiration of the period of limitations for the filing of a new claim but before the original claim has been acted upon by the Commissioner of Internal Revenue has been considered by this court in several comparatively recent cases.

United States v. *Memphis Cotton Oil Co.* (1933), 288 U. S. 62; 53 S. Ct. 278, 77 L. Ed. 619;
United States v. *Henry Prentiss Co.* (1933), 288 U. S. 73; 53 S. Ct. 283, 77 L. Ed. 626;
United States v. *Factors & Finance Co.* (1933), 288 U. S. 89; 53 S. Ct. 287, 77 L. Ed. 633;
Bemis Bros. Bag Co. v. *United States* (1933) 289 U. S. 28; 53 S. Ct. 454, 77 L. Ed. 1011;
George Moore Ice Cream Co. v. *Rose* (1933), 289 U. S. 373; 53 S. Ct. 620, 77 L. Ed. 1265.

In all of the above cases except *United States* v. *Henry Prentiss Co.*, (*supra*), this court held that the amendment after the expiration of the statutory period was timely and proper. The facts in the case at bar, however, are not identical with the facts in any of the cases decided by this court. Petitioner contends that the case at bar comes within the rule of the *Prentiss* case. The court below held and respondent contends that the case at bar comes within the rule of *United States* v. *Memphis Cotton Oil Co.* and the other cases in which the amendment was held to be proper and timely.

In *United States* v. *Memphis Cotton Oil Co.* (*supra*) and the other cases cited above this court pointed out that in determining whether an amendment is timely and proper the purpose of the statutes and the regulations and the practice in the administrative review of claims must be kept in mind.

The applicable statutes are Section 284 (a) and (b) of the Revenue Act of 1926 (printed in full in appendix) and Section 3226 of the Revised Statute as reenacted in Section 1113 of the Revenue Act of 1926 (printed in full in appendix). The applicable provision of the Regulations is Article 1254 of Regulations 74 (printed in full in appendix).

Section 284 (a) and (b) of the Revenue Act of 1926 provides for the refund of taxes overpaid if a claim therefor is filed by the taxpayer within the period stated, which period with respect to taxes for 1919 was four years from the time the tax was paid. The amount of the refund was also limited to the tax paid within the four years preceding the filing of the claim.

Section 3226 of the Revised Statutes as reenacted in Section 1113 of the Revenue Act of 1926 (printed in full in appendix) provides that no suit shall be maintained for the recovery of an internal revenue tax erroneously or illegally collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provision of law in that regard, and the regulations

of the Secretary of the Treasury established in pursuance thereof.

Regulations 74, Article 1254 (printed in full in appendix) pertaining to claims for refund provides among other things that the claim must set forth in detail under oath each ground upon which a refund or credit is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof.

The statutes make no provision in regard to the form of the claims. They merely require the filing of a claim with the Commissioner within the limitation period and require that a subsequent action in court must be based upon a claim filed. The purpose of the statutes is clearly to provide a limitation period, the expiration of which closes all dispute in regard to the correct tax liability for the period involved and to further provide the Commissioner with the opportunity to consider the claims of the taxpayer and correct mistakes prior to litigation and thereby avoid litigation in cases in which he is satisfied that the tax has been overpaid.

Nichols v. *United States*, 7 Wall. 122, 19 L. Ed. 125;
United States v. *Felt & Tarrant Mfg. Co.* (1931) 283 U. S. 269, 51 S. Ct. 376, 75 L. Ed. 1025;
Continental-Illinois National Bank & Trust Co. v. *United States* (CCA-7, 1932) 67 F. (2d) 153;
Dascomb v. *McCuen* (CCA-2, 1934) 73 F. (2d) 417.

In the case at bar the requirements of the statutes were fully complied with by respondent. A written claim for refund for the full amount of the taxes sought to be recovered was filed with the Commissioner of Internal Revenue within the time provided by law. The Commissioner was given timely notice that the taxpayer contended that its taxes had been overpaid in the amount now sought to be recovered and the Commissioner had full opportunity to correct the error and close the matter without litigation. The Commissioner determined that respondent's claim was not meritorious and rejected the claim. Thereafter, and

within the time provided by law, respondent filed its action in the United States District Court in which it relied entirely upon grounds and contentions which had been presented to and considered by the Commissioner and rejected by him. This is not a case in which the grounds for recovery were presented for the first time in court.

The only provision in regard to the form and contents of claims for refund is contained in the Regulations (Regulations 74, Article 1254). This court has stated that "The function of the regulation is to facilitate research." *United States* v. *Memphis Cotton Oil Co.* (1933), 288 U. S. 62; 53 S. Ct. 278, 77 L. Ed. 619; *Tucker* v. *Alexander* (1927) 275 U. S. 228, 48 S. Ct. 45, 72 L. Ed. 253. Certainly if the Commissioner is to properly consider claims for refund he must be apprised of the facts upon which the claims are based and the claimant should furnish those facts in the form provided by the Commissioner. Furthermore, the Commissioner is clearly justified in denying a claim if the facts upon which it is based are not furnished to him. However, the statement of facts is not the claim and should not be confused with it. The claim is that a particular tax has been overpaid. The facts are merely the basis for the claim. A claim which states no facts at all is nevertheless a claim within the meaning of the law. It may be subject to rejection for formal defects but it is nevertheless a valid claim which may be perfected after the expiration of the statutory period for filing claims. If the claim is perfected before it is acted upon, the fact that the requirements of the regulations were not complied with before the statute expired does not preclude recovery. *United States* v. *Memphis Cotton Oil Co.* (*supra*); *Tucker* v. *Alexander* (*supra*).

Likewise, the consideration of a claim is not limited to the facts and grounds stated therein. The facts stated may clearly show that income has been included in the return which was not legally taxable or that the taxpayer failed to take deductions to which he was entitled by law but if in-

vestigation of other facts not included in the claim discloses other errors which establish that regardless of the error asserted by the taxpayer the total tax paid was not in excess of that legally due no refund is allowable.

Lewis v. *Reynolds* (1932) 284 U. S. 281, 52 S. Ct. 145, 76 L. Ed. 293.

The issue presented by a claim for refund is not merely whether a particular receipt was income or whether a particular expense was allowable as a deduction, but whether on all the facts the tax for the period involved was overpaid. *Lewis* v. *Reynolds* (*supra*). When a claim for refund is filed all the facts pertaining to the period involved are open to investigation in order that it may be determined whether the tax for that period has been overpaid. As stated by this court in *United States* v. *Memphis Cotton Oil Co.* (1933), 288 U. S. 62, 70; 77 L. Ed. 619, 624:

> "***No matter though the claim for refund be specific and limited, the Commissioner is at liberty to audit the return afresh and to strike a new balance as the facts may then appear. Commonly, though, it seems, not always, a general audit will be necessary or will be at least a wise precaution, whether the claim is broad or narrow, if the government is to have the benefit of any compensating adjustments. There is little doubt that this conception of duty and of prudence has had recognition and emphasis in administrative practice."

If the investigation of a claim for refund discloses that the tax was not overpaid, no refund is allowable regardless of the merits of the grounds and contentions stated in the claim. Likewise, if the investigation discloses that the tax has been overpaid, the overpayment should be refunded regardless of whether the original claim contained the facts which eventually establish the overpayment, particularly when during the period of investigation the claimant has specifically presented the facts which establish the overpayment.

If the purpose of the regulation is to facilitate research and to assist the Commission in investigating the return, it cannot make any material difference whether the facts are furnished before or after the expiration of the period for filing the claim as long as they are furnished before the investigation is completed. The Commissioner certainly suffers no hardship or disadvantage if the facts and grounds are presented to him while he is investigating the claim and while he still has opportunity to consider the facts upon their merits.

The purpose of the regulations was likewise fully satisfied in the case at bar. The Commissioner had timely notice that respondent contended that taxes paid by it for the year 1919 were erroneously and illegally collected. While the claim of the taxpayer was being investigated an amendment was filed which merely stated a further reason in support of respondent's claim. This amendment was received by the Commissioner and the facts and contentions therein were investigated and considered along with the facts alleged in the original claim. The Commissioner treated the original claim and the amendment as one claim. In his letters to respondent in regard to the claim (R. 37, 39, 42) the Commissioner referred to respondent's "claim for refund" and in his letters he considered the facts and contentions in both the original claim and the amendment. No objection was made to the fact that the amendment was filed after the expiration of the period for filing new claims until after the contentions presented in the amendment had been fully considered by the Commissioner and he had notified respondent of his determination in regard thereto.

The facts in this case show clearly that the purpose of the regulations was fully satisfied and that the Commissioner was in no way inconvenienced or hindered in his research by the late filing of the amendment.

Respondent submits that the amendment to its claim for refund was proper and timely and that the claim as amended fully complied with the requirements of the stat-

utes and the regulations and furnished a proper basis fo the action in the District Court.

Petitioner contends that the amendment herein pre sented a new cause of action and therefore was not a prope amendment after the expiration of the statutory period fo filing a new claim. The courts and the Board of Tax Ap peals have consistently held that there is only one caus of action in regard to the tax for any particular period an that is whether the disputed tax is erroneous. The partic ular ground alleged to support the contention that the dis puted tax is erroneous is not the cause of action.

Lewis v. *Reynolds* (1932), 284 U. S. 281, 53 S. Ct. 145 76 L. Ed. 293;
Bowe-Burke Mining Co. v. *Willcuts* (D. C. Minn 1930) 45 F. (2d) 394;
Bertelsen v. *White* (D. C. Mass. 1932) 58 F. (2d 792, aff'd. (CCA-1, 1933) 65 F. (2d) 719;
Chicago Junction Railways v. *United States* (Ct. Cls 1935) 10 F. Supp. 156;
Rieck v. *Commissioner,* 35 B. T. A. 1178.

In the recent case of *Edward E. Rieck* v. *Commissioner* 35 B. T. A. 1178, there was presented to the Board of Ta Appeals the question of whether a petition which set fort a specific ground could be amended after the expiration o the period for filing petitions to state another specifi ground. The Board of Tax Appeals held that the cause o action in an action before the Board was not the particula ground alleged but the correct tax liability for the perio in question and that the amendment was permissible an related back to the time the original petition was filed.

Likewise, in the case at bar, the cause of action, if tha term may be properly used in connection with a claim fo refund, was whether the tax had been overpaid. Both th grounds of the original claim and those of the amendmen support respondent's claim that its tax was overpaid. Th amendment did not present a new cause of action bu merely presented a new theory or ground of recovery an

perfected the original claim to include the additional theory. Such an amendment is generally permitted under modern liberal rules of pleading especially where it does not result in hardship to the other party.

The amendment to the claim for refund was proper and timely under the rule of the decisions of this court.

Petitioner contends that the case at bar comes within the rule of *United States* v. *Henry Prentiss Co.* (1933), 288 U. S. 73; 53 S. Ct. 283, 77 L. Ed. 626; *United States* v. *Richards* (CCA-6, 1935) 79 F. (2d) 797; certiorari denied 296 U. S. 718; *New York Trust Company* v. *United States* (CCA-2, 1937) 87 F. (2d) 889; certiorari denied July 1, 1937; *Bryant Paper Co.* v. *Holden,* 63 Fed. (2d) 370; certiorari denied 290 U. S. 631; and *Swedish Iron & Steel Corporation* v. *Edwards* (D. C. N. Y. 1932) 1 F. Supp. 335. Respondent submits that the facts and issues in the above cases are so different from the facts in the case at bar that the cases are clearly distinguishable and do not support petitioner's contentions herein. Respondent also submits that the case at bar comes within the general rule established by *United States* v. *Memphis Cotton Oil Co.* (1933), 288 U. S. 62; 53 S. Ct. 278, 77 L. Ed. 619, *George Moore Ice Cream Co.* v. *Rose* (1933), 289 U. S. 373; 53 S. Ct. 620, 77 L. Ed. 1265, *Bemis Bros. Bag Co.* v. *United States* (1933), 289 U. S. 28; 53 S. Ct. 454, 77 L. Ed. 1011, and *United States* v. *Factors & Finance Co.* (1933), 288 U. S. 89; 53 S. Ct. 287, 77 L. Ed. 633 and comes directly within the rule of *Youngstown Sheet & Tube Co.* v. *United States* (Ct. Cls. 1934) 7 F. Supp. 290, certiorari denied 293 U. S. 599; *Con P. Curran Printing Co.* v. *United States* (Ct. Cls. 1936) 15 F. Supp. 153; certiorari denied 57 S. Ct. 788. See also *Staton* v. *United States* (D. C. Okla. 1935) 9 F. Supp. 428; *Marks* v. *United States* (D. C. N. Y. 1937) 18 F. Supp. 911; *Edward E. Rieck* v. *Commissioner,* 35 B. T. A. 1178.

The facts in *United States* v. *Prentiss* (*supra*) are very different from the facts in the case at bar. In that case the taxpayer in its original return requested a special assessment under the provisions of Sections 327 and 328 of the Revenue Act of 1918. Those sections afforded relief to taxpayers who due to abnormal conditions in their business would be forced to pay an abnormally high tax if the tax were computed in the ordinary manner provided by the law. The granting of such relief by special assessment was discretionary with the Commissioner and his action in this regard was not reviewable by the courts except in case of fraud or other irregularities. Before a request for such relief would be considered it was necessary that the statutory tax be definitely determined and agreed upon. The taxpayer in *United States* v. *Prentiss* (*supra*) was so notified by the Commissioner and apparently acquiesced in the computation of the statutory tax. After the Commissioner had reviewed the taxpayer's request for special assessment and had notified the taxpayer that the request would not be allowed, and after the time had expired for filing a new claim for refund, the taxpayer amended its claim in which it contended that its invested capital had been erroneously computed and that the tax which had been assessed and collected under the statutory method was erroneous. In passing upon the validity of the amendment this court pointed out that in requesting a special assessment the taxpayer had necessarily abandoned any claim that it might have had that the computation of the statutory tax was erroneous. The original claim admitted the correctness of the statutory tax and asked for discretionary relief. The amendment was a complete departure from the original claim and attempted to convert a request for discretionary relief into a claim of statutory error. This court held that the amendment was such a complete metamorphosis of the original claim that it could not be considered an amendment thereof. Furthermore, the original claim, instead of requiring or suggesting a reaudit of the statutory tax lia-

bility, admitted that it was correctly computed, while the amendment was based upon the contention that the statutory tax was erroneously computed and required a reaudit.

In the case at bar there is no such conflict or inconsistency between the original claim and the amendment. Both claims were based upon statutory grounds and in neither was there any request for discretionary relief. Both the original claim and the amendment required a reaudit of the tax return and the income of the taxpayer. Neither were the grounds and contentions in the amendment in any way inconsistent with the grounds and contentions in the original claim. All of the contentions could have been consistently urged in one claim and were presented in the complaint to the District Court. It is true that the original claim did not challenge the correctness of the computation of respondent's gross income but that omission did not constitute an admission that the gross income was correctly computed or an abandonment of any contentions in that regard. In order to properly rule on respondent's original claim the Commissioner should have reaudited respondent's gross income to determine whether it had been fully stated. If he had found the gross income understated he certainly would and should have determined that there had been no overpayment of tax even though respondent's claim for additional deductions had been determined to be valid. Likewise, respondent's contention in the amendment that it had no income was not inconsistent with its contention in the original claim that it was entitled to additional deductions. Taxpayers who have no taxable income frequently have expenses which would be deductible if they had income. Respondent submits that the facts and the issue in the case at bar are in no way comparable to the facts and issue which this court considered in *United States* v. *Prentiss* (*supra*) and that the rule of that case has no application to the case at bar.

Petitioner also relies on *New York Trust Company* v. *United States* (CCA-2, 1937) 87 F. (2d) 889, certiorari de-

nied July 1, 1937, *United States* v. *Richards* (CCA-6, 1935) 79 F. (2d) 797, certiorari denied 297 U. S. 718, *Bryant Paper Co.* v. *Holden*, 63 Fed. (2d) 370, certiorari denied 290 U. S. 631, and *Swedish Iron & Steel Corporation* v. *Edwards* (D. C. N. Y. 1932) 1 F. Supp. 335. Each of those cases is clearly distinguishable from the case at bar. In *United States* v. *Richards* (*supra*), *New York Trust Company* v. *United States* (*supra*) and *Swedish Iron & Steel Corporation* v. *Edwards* (*supra*) the courts expressly found that the original claims had been rejected *before* the amendments were filed. It is well established that a claim cannot be amended after the statutory period has expired and after the claim has been rejected. Also in *United States* v. *Richards* and *New York Trust Company* v. *United States* the amendment sought deductions for certain taxes paid by partnerships of which the taxpayers were members and thus required an investigation of the affairs and records of new and entirely separate taxpayers. In *New York Trust Company* v. *United States* (*supra*) the court stated (87 F. (2d) 891):

> "When the amendment requires examination of the records of another taxpayer, we think that inquiry is forced into paths too far removed from those to which the original claim directed it. We agree with the view expressed by the Sixth Circuit in the Richards case."

In the case at bar both the original claim and the amendment related only to affairs of the taxpayer and required no examination or inquiry into the records or affairs of any other taxpayer or entity.

In *Bryant Paper Co.* v. *Holden* (*supra*) the alleged amendment was filed as a new claim and did not seek to relate itself to the original timely claim.

In the case at bar the amendment was clearly and definitely intended as an amendment of the original claim. Furthermore, it was received and treated by the Commissioner as an amendment of the original claim, the amend-

ment was filed while the original claim was still under investigation and prior to any notice of determination or action by the Commissioner; and the Commissioner considered the contentions advanced in the amendment on their merits.

The case at bar is more nearly analogous to and comes within the general rule of *United States* v. *Memphis Cotton Oil Co.* (1933), 288 U. S. 62, 53 S. Ct. 278, 77 L. Ed. 619 and *George Moore Ice Cream Co.* v. *Rose* (1933), 289 U. S. 373, 53 S. Ct. 620, 77 L. Ed. 1265, in that the amendment was filed while the investigation of the original claim was still in progress; the issue raised by the amendment was within the scope of the investigation required or suggested by the original claim, the contentions presented in the amendment were in no way inconsistent with the contentions advanced in the original claim and the Commissioner treated the amendment as a valid amendment and considered the contentions advanced therein on their merits.

In *George Moore Ice Cream Co.* v. *Rose* (1933), (*supra*), the taxpayer's original claim for refund alleged error in the determination of its invested capital for excess profits tax purposes and set forth the particular assets which it contended had been overvalued. The claim further stated "The original return for this year reflected a loss of $21,047.25. The agent made adjustments to reflect taxable gain of $16,940.18—a difference of $37,897.43. If the audit now being made reflects a different result it will be submitted as additional evidence."

After the statutory period had expired a detailed statement was filed showing the items entering into and making up net income. The Supreme Court held that the amendment was proper and being filed before the claim was rejected was timely.

Respondent's contentions are also supported by the following decisions of lower courts:

Youngstown Sheet & Tube Co. v. *United States* (Ct. Cl.), 7 F. Supp. 290; certiorari denied 293 U. S. 599;

Con. P. Curran Printing Co. v. *United States* (Ct. Cl. 1936), 15 F. Supp. 153; certiorari denied 57 S. Ct. 788;
Marks v. *United States*, 18 F. Supp. 911;
Rieck v. *Commissioner*, 35 B. T. A. 1178.

See, also:

United States v. *Humble Oil & Refining Co.* (CCA-5, 1934), 69 F. (2d) 214;
National Park Bank v. *United States* (CCA-2, 1933), 65 Fed. 415;
Staton v. *United States* (D. C. Okla., 1935) 9 F. Supp. 428.

In *Youngstown Sheet & Tube Co.* v. *United States* (*supra*) the original timely claim stated a specific ground for recovery and after the statutory period had expired an amendment was filed in which another specific ground was set forth. The court stated the issue as follows (p. 293):

> "This brings us to the crux of the case: May a claim which assigns a specific ground for recovery (here deductions from gross income) be amended or supplemented, after the statute has run for filing a new claim, but before the Commissioner has finally acted on the original claim, in order to permit a taxpayer to claim additional deductions and thereby secure a greater refund than would have been permitted on account of the specific ground assigned in the original claim?"

After carefully examining and discussing the decisions of this Court, the Court of Claims determined that the amendment was permissible and valid. The government's petition for certiorari was denied. *United States* v. *Youngstown Sheet & Tube Co.*, 293 U. S. 599. The rule of this case was stated with approval in *Staton* v. *United States* (D. C. Okla., 1935), 9 F. Supp. 428, and was again specifically stated and followed by the Court of Claims in *Con. P. Curran Printing Co.* v. *United States*, 14 F. Supp. 638, certiorari denied 57 S. Ct. 788 and in *Andrews* v. *United States*, 17 F. Supp. 980, now pending on certiorari 1937 Term No. 48.

Respondent submits that the amendment to the original claim for refund herein was a valid and timely amendment and that the claim as amended complied with the requirements of the statutes and the regulations and furnished a proper basis for all the issues presented in the suit in the District Court.

II.

In Considering the Grounds and Contentions Advanced in the Amendment on Their Merits, the Commissioner of Internal Revenue Waived Any Defects in or Objections to the Claim for Refund.

It was contended by respondent before the lower courts that even if the amendment was not timely, in considering on their merits the grounds and contentions advanced therein, the Commissioner of Internal Revenue waived his objection that the contentions were not stated in the original claim. The Circuit Court determined that the amendment was proper and timely and did not consider this alternative contention.

As respondent has more fully stated in Part I of this brief, the statutes which provide for the filing of claims for refund of taxes impose no requirements in regard to the form and contents of such claims. The only requirement of the statute is that the claim be filed within the specified time. (Section 284 (a) and (b) of the Revenue Act of 1926 and Revised Statutes, Section 3226, as reenacted in Section 1113 of the Revenue Act of 1926). The requirements in regard to the form and contents of claims for refund are contained in the regulations. (Regulations 74, Article 1254).

The requirements contained in the regulations are for the purpose of apprising the Commissioner of the facts upon which the claim is based and facilitating his research and review of the claim. *United States* v. *Memphis Cotton Oil Co.*, (1933) 288 U. S. 62, 53 S. Ct. 278, 77 L. Ed. 619; *Tucker* v. *Alexander* (1927), 275 U. S. 228, 48 S. Ct. 45,

72 L. Ed. 253. In order that administrative review of claims may be expedited, it is necessary that the Commissioner have the power to prescribe certain reasonable conditions and require compliance therewith. A claim which does not comply with the conditions imposed by the regulations is subject to rejection but it is nevertheless a claim within the meaning of the law. *United States* v. *Memphis Cotton Oil Co. (supra).* Since the requirements imposed by the regulations are for the convenience and assistance of the Commissioner, compliance therewith may be waived by the Commissioner either expressly or impliedly.

> *Tucker* v. *Alexander* (1927), 275 U. S. 228, 48 S. Ct. 45, 72 L. Ed. 253;
> *United States* v. *Memphis Cotton Oil Co.* (1933), 288 U. S. 62; 53 S. Ct. 278, 77 L. Ed. 619;
> *United States* v. *Humble Oil & Ref. Co.* (CCA-5, 1934), 69 Fed. (2d) 214;
> *Reynolds* v. *McMurray* (CCA-10, 1935), 77 Fed. (2d) 740;
> *U. S. Paper Exports Ass'n.* v. *Bowers* (D. C. N. Y., 1934), 6 F. Supp. 735;
> *Weihman* v. *United States* (D. C. Pa., 1933), 4 F. Supp. 155.

In *Tucker* v. *Alexander, supra,* this Court held that the Commissioner might waive the requirements so as to permit a taxpayer to recover in court on a ground not stated in the claim for refund.

In *United States* v. *Memphis Cotton Oil Co., supra,* this Court again pointed out that the Commissioner might waive defects in a claim for refund and further stated that where the defects in form of a timely claim are corrected by amendment, if the Commissioner hears the claim as amended on its merits, the claims become a single indivisible claim, the new being indissolubly welded into the structure of the old. It cannot be denied, and it has been found as a fact, that in the case at bar the Commissioner did consider appellant's claim as amended and did consider on

their merits the grounds and contentions therein. It would seem to follow from the above cases that the claim and the amendment thereby became a single, indivisible claim and that the amendment was indissolubly welded into the old claim. That being true it must follow that appellant's action in court was based upon a proper and timely claim and that the District Court erred in finding otherwise.

In *United States Paper Exports Ass'n.* v. *Bowers* (D. C. N. Y., 1934), 6 F. Supp. 735, the claim was inadequate on its face but from a notation on the claim, apparently made by some one in the collector's office, and from the statements in the rejection letter, it was apparent that the Commissioner was apprised of and had considered the contentions advanced in court. The defendant contended that the claim did not state the same facts relied on in the court action. The court held (p. 739):

> "The claim for refund was understood by the Commissioner to embrace the contention which was passed upon in the motion to dismiss and therefore must be deemed adequate."

In *United States* v. *Humble Oil & Refining Co.* (CCA-5, 1934), 69 Fed. (2d) 214, the court held that the requirements of the regulations in regard to claims for refund could be waived by the Commissioner and that in considering the taxpayer's contentions on their merits the Commissioner did waive objection to the defects in the claim.

In the case at bar respondent filed its claim for refund for $3,105.65, the full amount sought to be recovered, on March 30, 1929, which was within the time provided by law. The only defect in the claim as a basis for the later court action was that it did not state the grounds and facts which established that respondent had no taxable income in the year 1919. This defect was perfected by the amendment which was filed with the Commissioner on May 31, 1929. The Commissioner raised no objection to the filing of the amendment and did not refuse to consider the contentions

therein. On the contrary, he received the amendment, treated the original claim and the amendment as one claim and proceeded to consider the contentions advanced in the amendment on their merits. In his letter to respondent dated August 12, 1929 (R. 37) the Commissioner raised no objection to the amendment but considered all the contentions as though they had been stated in one claim. It was not until his letter of November 13, 1929 (R. 39), which was after the requirements of the regulations had been fully complied with and the Commissioner had considered all the contentions of respondent, that objection was raised to the fact that the original claim did not state the facts in regard to the contention that respondent realized no income in 1919.

Respondent contends that in treating the original claim and the amendment as one claim and in considering on their merits the contentions advanced in the amendment the Commissioner waived the failure of the original claim to set forth the contentions later raised in the amendment. It is true that the Commissioner eventually raised the objection that the original claim did not contain the facts and contentions later relied upon but before such objection was raised the purpose of the requirement in that regard had been fully satisfied. The Commissioner had been fully advised and had considered the contention on its merits. The raising of the objection at that stage was not for the convenience of the Commissioner nor for the purpose of expediting review but solely for the purpose of denying a refund to which the taxpayer was entitled. Respondent submits that the objection of the Commissioner to the form of the original claim came too late since he had already waived the defects. Furthermore, having waived strict compliance with the formal requirements set forth in the regulations, the failure to comply with said requirements cannot be effectively raised as a defense to the action in court to recover the overpayment.

United States v. *Humble Oil & Ref. Co.* (CCA-5, 1934), 69 F. (2d) 740;
Reynolds v. *McMurray* (CCA-10, 1935), 77 F. (2d) 740.

In answer to respondent's contentions in this regard petitioner argues in Part II of its brief herein that, *first*, there was no waiver by the Commissioner and, *second*, that the Commissioner had no power to waive the statutory requirement that a claim be filed within the period fixed by law.

Petitioner defines waiver as an intentional relinquishment of a known right and contends that no waiver was intended by the Commissioner in this case. The intention to relinquish a right need not be express in order to establish a waiver. The intention may be implied from the conduct of the party and will be implied when a party fails to assert a right which he knows he possesses.

Mitchell v. *Kemp & Burpee Mfg. Co.* (CCA-3, 1915) 218 Fed. 843;
Marine Iron Works v. *Wiess* (CCA-5, 1906) 148 Fed. 145;
Champion Spark Plug Co. v. *Automobile Sundries Co.* (CCA-2, 1921) 273 Fed. 74.

There can be no doubt that the Commissioner had knowledge of his right to refuse to consider contentions not set forth in the claim for refund for the rule was not which he himself established. As the requirements of the regulations were for the convenience of the Commissioner in reviewing the claim he had the power to insist on compliance or waive compliance. The failure of the Commissioner to raise the objection that the claim was not in proper form and his action in considering the merits of the claim clearly establish a waiver of his right to demand strict compliance with the regulations and the waiver having been made it could not be withdrawn. *Champion Spark Plug Co.* v. *Automobile Sundries Co. (supra).*

The right of the Commissioner to reject a claim for refund for failure to comply with the requirements of the regulations is analogous to the right of a defendant to demur specially to the form of a complaint in a law action. If the defendant pleads to the merits without having demurred to the complaint he waives his right to demur. *Townsend* v. *Jemison*, 7 How. 706, 12 L. Ed. 880.

Respondent submits that the Commissioner did waive the defect in the original claim by considering the contention not expressly stated therein and that the waiver could not be withdrawn and the objection to the form of the claim effectively asserted after the contention had been investigated and considered. The reason for denial of a claim for failure to state the facts and grounds ceases to exist after the facts and grounds have been considered and ruled upon.

Petitioner's argument to the effect that the Commissioner has no power to waive the bar of the statute of limitations in actions for the recovery of taxes has no bearing upon the issue here presented. Respondent does not contend that the Commissioner in this case waived the statute of limitations. Respondent's contention is that the Commissioner waived the defects in respondent's original claim which it is conceded was filed within the statutory period. Respondent's original claim was for the full amount sought to be recovered. It complied with all the requirements of the law, but it was defective in that it did not set forth all the grounds and facts as required by the regulations. It is the failure of the original claim to comply with the requirements of the regulations that respondent contends was waived by the Commissioner. Petitioner apparently concedes that the Commissioner may waive compliance with the requirements of the regulations. For the reasons set forth and upon the authorities cited above respondent submits that the Commissioner did waive compliance with the requirements of the regulations in the case at bar.

CONCLUSION.

In conclusion respondent submits that:

1. The amendment of May 31, 1929, being filed with the Commissioner before he rejected the original claim was timely filed and was a valid amendment to the original claim filed March 30, 1929.

2. In treating the amendment of May 31, 1929 as a valid amendment and in considering on their merits the contentions and facts stated therein, the Commissioner waived any defects in or objections to the claim for refund as amended and cannot rely on such defects as a defense to the recovery in court.

3. This action is based upon a valid and proper claim for refund and the District Court erred in failing to so find and conclude.

4. The decision of the court below reversing the judgment of the District Court is correct and should be affimed.

Respectfully submitted,

JOHN B. MILLIKEN,
808 Bank of America Bldg.
Los Angeles, California

L. A. LUCE,
937 Munsey Building,
Washington, D. C.
Counsel for Respondent.

Of Counsel:

CLAUDE I. PARKER,
BAYLEY KOHLMEIER,
808 Bank of America Bldg.,
Los Angeles, California.

APPENDIX.

Revenue Act of 1926—Section 284 (a) and (b).

Sec. 284(a). Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c), (d), (e) and (g) of this section:

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

Revenue Act of 1926—Section 1113.

Sec. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

> "Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue,

according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be began before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

(b) This section shall not affect any proceeding in court instituted prior to the enactment of the Revenue Act of 1924.

Regulations 74, Article 1254, as amended by T. D. 4265 (Cum. Bull. VIII-1, p. 110).

(1) A claim for refund or credit of any internal revenue tax, or for refund of interest or penalties, erroneously or illegally collected should be made on the form prescribed by the Treasury Department (Form 843), and should be filed with the collector of internal revenue, although a claim will not be considered defective solely by reason of the fact that it is not made on the form or that it is filed with the Commissioner of Internal Revenue. The claim must set forth in detail and under oath each ground upon which a refund or credit is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. Any claim which does not comply with the requirements of the preceding sentence will not be considered for any purpose as a claim for refund or credit.

(2) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds so set forth in a claim or an amendment thereof, filed prior to the expiration of such period.

(3) These regulations shall take effect on May 1, 1929, and shall be applicable to all claims filed on or after such date, and all other regulations are modified in so far as they are inconsistent with these regulations.

BLANK

PAGE

SUPREME COURT OF THE UNITED STATES.

No. 262.—October Term, 1937.

The United States of America, Petitioner, *vs.* Garbutt Oil Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[January 3, 1938.]

Mr. Justice Roberts delivered the opinion of the Court.

The issue in this case is similar to that presented in *United States* v. *Andrews, supra,* p. —, decided this day. The action was brought by the respondent in the District Court for Southern California to recover an alleged overpayment of income taxes for 1919. There is no controversy as to the facts found by the trial court. The respondent, a California corporation, acquired a lease of oil property October 3, 1907. April 10, 1911, the directors resolved that all oil produced after January 1 of that year should be transferred in kind to the lessors to the extent of their royalty interest and to the company's stockholders pro rata to their respective holdings, so long as the latter should pay calls for money necessary to defray the company's expenses. The resolution remained in effect to and including the year 1919 and distribution of all oil produced was made accordingly. In its books of account and its return for income tax the respondent recorded at market value the oil produced and treated the difference between that value and the cost of production as income. The Commissioner of Internal Revenue followed the same method in computing taxable income. In its 1919 return the respondent disclosed a net income of $16,928.61 and a tax liability of $2,072.68 which was paid during the year 1920. The Commissioner, as the result of an audit, assessed an additional tax of $3,105.65 which was paid April 3, 1925.

March 30, 1929, within the four year period of limitations prescribed by the applicable statute,[1] the respondent filed a claim for the return of the additional tax so paid, based upon two grounds: first, that the respondent was entitled to an additional deduction

[1] Revenue Act of 1926, Ch. 27, Sec. 284 (a) (b) (1) (2), 44 Stat. 9, 66.

of $12,500 for the amortization of the cost of a drilling contract with Union Oil Company by which the latter, in consideration of $250,000 par value of respondent's stock, agreed to provide expenses of developing the leased oil property, reimbursement to be made only out of oil produced; and, second, that, in respect of excess profits tax, its invested capital had been understated by failure to include the unrecovered cost of the same contract in the sum of $109,375. While this claim was pending, but subsequent to the expiration of the period of limitation, the respondent filed a "Statement of Garbutt Oil Company . . . for the purpose of perfecting and completing claim for refund covering alleged overpayment of income tax for the calendar year 1919." Therein the respondent asserted that it "now develops that a further reason exists in support of" the pending claim since, by distribution of oil in kind, the respondent realized no taxable income during 1919, and that "it therefore follows that even though the specific grounds set forth in the claim for refund are denied said claim should, nevertheless, be allowed in full", for the reasons set forth in the statement. Refund was demanded of the entire tax paid for 1919 ($5,178.33) "or so much thereof as is properly refundable within the statute of limitations." August 12, 1929, the Commissioner wrote the respondent, concerning the merits of the original claim and the amendment, stating that a refund of $3,105.65 would not be allowed but that a hearing could be had upon the proposed rejection if requested in writing. On October 4, 1929, a conference was held but it does not appear whether the merits of the amendment were discussed. November 13, 1929, the Commissioner advised the respondent that the claim would be rejected on the merits and that the new contention embodied in the statement filed would be rejected as it was not referred to in the timely claim and was presented only after the expiration of the period of limitations and after the expiration of the time allowed to perfect informal claims, pursuant to a Treasury decision. Formal rejection of the claim was made November 21, 1929.

The respondent brought suit for the recovery of the $3,105.65 it being admitted that the remainder of the tax paid for the year 1919 could not be recovered because not claimed within the four year period specified in the statute. At the trial the grounds of the refund claim originally filed were abandoned and recovery was

sought upon the basis of the statement filed after the expiration of the statutory period of limitation. The court held that the latter did not constitute an amendment of the claim originally filed and came too late although it also found that the Commissioner had considered the late contention on its merits. Judgment was entered in favor of the United States. The Circuit Court of Appeals reversed, holding the statement filed as an amendment was germane to the original refund claim and that both were grounded in substantially the same facts.[2] We granted certiorari to resolve alleged conflict of decision.

In view of what has been said in *United States* v. *Andrews* (*supra*), it is necessary only to inquire in the instant case whether the original claim was specific and the so-called amendment completely shifted to a totally different ground for refund.

The transactions of the taxpayer which gave rise to its tax liability were exceedingly simple due to the fact that it had resorted to distribution of all the oil produced, partly to its lessors as royalty and partly to its stockholders in return for their advancing the corporate expenses. If it was liable for income tax the method of calculation it adopted was apparently the correct one.

Claim for refund was not filed until 1929 when the statute of limitations had barred refund of all payments made by the respondent except the amount of the additional assessment paid in 1925. In an effort to recover that much of the tax paid for the year 1919 the claim set out two grounds: first, that a deduction of $12,500 should be allowed for amortization of a drilling contract which the company had and, second, that its invested capital should have been increased by more than $100,000 to embrace the unrecovered cost of this drilling contract. The claim directed the Commissioner's attention to these two items only. It gave him no notice that the taxpayer claimed not to have been in receipt of any income whatever for the taxable year. The documents would not naturally suggest any such claim for, as in *United States* v. *Henry Prentiss & Co., Inc.*, 288 U. S. 73, the ground asserted in the later demand was totally inconsistent with and involved a negation of that specified in the claim for refund. Before the Commissioner had acted on the claim for refund the respondent, in an effort to evidence continuity and identity of claim, filed its so-called statement perfecting and completing the claim for refund. This abandoned the grounds

[2] 89 F. (2d) 749.

originally alleged in support of the claim. The position taken in the amendment was that the taxpayer had no income whatever and that if the Commissioner refused refund on the basis of a rejection of the deductions claimed from gross income in the original demand, he should find that the taxpayer's operations were not productive of any income to it.

In defense of the amendment the respondent says that it was claiming only the $3,105.65 paid in 1929 pursuant to the additional assessment; that in no event could it recover the entire tax paid; that if the original grounds for claiming refund of payment of the sum in question had been held valid this would have been sufficient to require the refund of the whole of the sum, and the amended claim would have no different result. This contention is advanced to persuade us that, after all, the cause of action in this case was for the recovery of $3,105.65 as money had and received to the respondent's use, and that, therefore, there is no departure and no new cause of action asserted by the amendment. To adopt this view would be to disregard what was said in earlier cases to the effect that the analogies of pleading must not be pressed to such an extent as to disregard the realities of administrative procedure. The claim as filed called for no investigation of the question whether the taxpayer's transactions gave rise to income. On the contrary, the grounds advanced assumed the receipt of income. The claim being thus specific the Commissioner was entitled to take it at face value and to examine only the points to which it directed his attention. It would be to disregard the natural course of procedure in the Bureau to suppose that grounds thus specifically asserted would direct attention to another at war with them.

The respondent urges that although the amendment was not timely, the Commissioner, in considering the merits of the position taken therein, waived any objection which might have been available to him that this position was not disclosed in the original claim. The contention is bottomed upon the fact that, in his letter of August 12, 1929, the Commissioner refers to the reasons advanced in the untimely statement. The argument confuses the power of the Commissioner to disregard a statutory mandate with his undoubted power to waive the requirements of the Treasury regulations. The distinction was pointed out in *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 71, wherein it was said: "The line of division must be kept a sharp one between the function of a stat-

ute requiring the presence of a claim within a given period of time, and the function of a regulation making provision as to form. The function of the statute, like that of limitations generally, is to give protection against stale demands. The function of the regulation is to facilitate research." In the cited case, and others decided at about the same time, we held that, while the Commissioner might have enforced the regulation and rejected a claim for failure to comply with it in omitting to state with particularity the grounds on which the claim was based, he was not bound to do so, but might waive the requirement of the regulation and consider a general claim on its merits. This was far from holding that after the period set by the statute for the filing of claims he had power to accept and act upon claims that complied with or violated his regulations. *Tucker* v. *Alexander*, 275 U. S. 228, cited by the respondent, is clearly distinguishable. There a timely claim was filed and disallowed. It alleged two specific grounds for refund. Suit was brought to recover the alleged overpayment and again reliance was placed on the same two specific grounds. At the trial of the action, and within the period of limitations, the taxpayer abandoned the grounds alleged in its claim and complaint and asserted a new ground. Counsel for the government stated that the new question brought forward was the only one involved in the case and stipulated as to the amount to be recovered if the trial court should hold in favor of the taxpayer on this new ground. The court did so. On appeal the government, for the first time, raised the point of the insufficiency of the claim for refund and the Court of Appeals held that the new basis for the claim did not sustain recovery because reference had not been made to it in the refund claim. This court decided that there was an express waiver as to the form and contents of the claim and that counsel representing the government had power, prior to the expiration of the period of limitation, to waive the objection that the supposed basis for refund was not disclosed in the claim. In so holding the court adverted to the fact that the Commissioner was not deceived or misled by the deficiency of the claim and that it was in the interest of justice that in the circumstances the claimant be not remitted to the resort of filing a new claim and pursuing it through the Bureau and the courts. The opinion expressly recognized that no officer of the government has power to waive the statute of limitations and cited, in support of the proposition, *Finn* v. *United States*, 123 U. S. 227, saying: "Such

waivers, if allowed, would defeat the only purpose of the statute and impose a liability upon the United States which otherwise would not exist—consequences which do not attach to the waiver here."

The statement filed after the period for filing claims had expired was not a permissible amendment of the original claim presented. It was a new claim untimely filed and the Commissioner was without power, under the statute, to consider it.

The judgment is

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.